INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF CASA NINA *V.* PERU

JUDGMENT OF NOVEMBER 24, 2020

(*Preliminary objections, merits, reparations and costs*)

In the case of *Casa Nina v. Peru,*

the Inter-American Court of Human Rights (hereinafter also "the Inter-American Court" or "the Court"), composed of the following judges:

Elizabeth Odio Benito, President
L. Patricio Pazmiño Freire, Vice President
Eduardo Vio Grossi, Judge
Humberto Antonio Sierra Porto, Judge
Eduardo Ferrer Mac-Gregor Poisot, Judge
Eugenio Raúl Zaffaroni, Judge, and
Ricardo Pérez Manrique, Judge,

also present,

Pablo Saavedra Alessandri, Secretary, and
Romina I. Sijniensky, Deputy Secretary

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter also "the American Convention" or "the Convention") and Articles 31, 32, 65 and 67 of the Rules of Procedure of the Court (hereinafter also "the Rules of Procedure" or "the Court's Rules of Procedure"), delivers this judgment structured as follows:

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I
INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. *The case submitted to the Court.* On August 6, 2019, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted to the jurisdiction of the Court the case of "Julio Casa Nina" against the Republic of Peru (hereinafter "the Peruvian State," "the State" or "Peru"). According to the Commission, the case relates to a series of violations that allegedly occurred during proceedings that culminated in the removal of Julio Casa Nina from the posit of Provisional Deputy Prosecutor of the Second Criminal Prosecution Office of the province of Huamanga, Ayacucho, Peru. The Commission considered that the appointment of the presumed victim had been made with no specific time frame or conditions and was limited to a general mention of the needs for the service, and this was incompatible with the enhanced guarantee of job stability that should protect prosecutors to safeguard their independence. It also alleged that the procedure based on which Mr. Casa Nina was removed from his post did not respect the right of defense, the principle of legality, the principle of presumption of innocence, and the right to duly reasoned decisions, which also violated the right to accede to and remain in a post under general conditions of equality. Lastly, it argued a violation of the right to judicial protection because the administrative and legal remedies and actions were ineffective to contest the decision that removed the presumed victim from his post.

2. *Procedure before the Commission*. The procedure before the Commission was as follows:

   a) Petition. On February 6, 2007, Julio Casa Nina (hereinafter also "the presumed victim") lodged the initial petition.

   b) Admissibility Report. On August 15, 2014, the Commission adopted Admissibility Report No. 79/14, in which it concluded that the petition was admissible.

   c) Merits Report. On October 5, 2018, the Commission adopted Merits Report No. 116/18 (hereinafter "the Merits Report" or "Report No. 116/18"), in which it reached a series of conclusions[1] and made various recommendations to the State.

3. *Notification to the State.* The Merits Report was notified to the State on November 6, 2018, granting it two months to report on compliance with the recommendations. On February 6, 2019, the Commission granted the State a two-month extension to comply with the recommendations of the Merits Report and, on May 6, 2019, it granted a second extension. The Commission denied the State's request for a third extension considering that it had "not expressed a clear intention to comply with the recommendations."

4. *Submission to the Court*. On August 6, 2019, the Commission submitted this case to the Court, indicating "the need to obtain justice for the [presumed[victim."[2] The Curt notes, with concern, that 12 years and 6 months passed between the lodging of the initial petition before the Commission and the submission of the case to the Court.

5. *The Commission's requests.* Based on the foregoing, the Commission asked the Court to conclude and declare the international responsibility of Peru for the violations contained in

[1] The Commission concluded that the State was responsible for the violation of the right to judicial guarantees, the principle of legality, the right to remain in public office under general conditions of equality and the right to judicial protection, recognized in Articles 8(1), 8(2), 8(2)(b), 8(2)(c), 9, 23(1)(c) and 25(1) of the Convention, in relation to the obligations established in Articles 1(1) and 2 of this instrument, to the detriment of Julio Casa Nina.

[2] The Commission appointed Commissioner Joel Hernández and then Executive Secretary Paulo Abrão, as its delegates before the Court, and Christian González Chacón, Executive Secretariat lawyer, as its legal adviser.

Report No. 116/18 and to order the State, as measures of reparation, those included in this report.

II
PROCEEDINGS BEFORE THE COURT

6. *Notification of the State and the presumed victim.* The submission of the case was notified to the State and the presumed victim in communications of August 27, 2019.

7. *Brief with pleadings, motions and evidence.* On October 31, 2019, Julio Casa Nina presented his brief with pleadings, motions and evidence (hereinafter "the pleadings and motions brief"), pursuant to Articles 25 and 40 of the Court's Rules of Procedure. The presumed victim was in substantial agreement with the allegations made by the Commission and, in addition, indicated that the State had violated his right to work. Also, he asked that the Court order the State to adopt various measures of reparation and to reimburse certain costs and expenses and, in this regard, he identified his wife, Mercedes Maritza Salinas Mamani, and his daughters, Yessenia Mercedes Casa Salinas and Lourdes Maritza Casa Salinas, as injured parties.

8. *Answering brief.* On February 4, 2020, the State submitted to the Court its brief answering the submission of the case in the Merits Report of the Inter-American Commission and the pleadings and motions brief of the presumed victim (hereinafter "the answering brief").[3] In this brief, the State filed two preliminary objections and contested the alleged violations and the requested measures of reparation.[4] It asked that the Court declare the Commission's claims without merit and find that the State was not responsible for the violations indicated in the Merits Report.

9. *Observations on the preliminary objections.* In briefs of March 22 and 25, 2020, the lawyer, Yessenia Mercedes Casa Salinas, representing the presumed victim (hereinafter "the representative")[5] and the Commission, respectively, presented their observations on the preliminary objections filed by the State.

10. *Final written procedure*. In an order of August 3, 2020, the President of the Court, in consultation with the full Court, decided that, for reasons of procedural economy and due to the situation caused by the COVID-19 pandemic, it was not necessary to call a public hearing in this case. She therefore required that the statements admitted be provided by affidavit.[6]

11. *Final written arguments and observations*. On October 8 and 9, 2020, the Commission, the representative and the State forwarded, respectively, their final written observations and their final written arguments, together with annexes.

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[3] In a communication of September 25, 2019, the State appointed the lawyer, Carlos Miguel Reaño Balarezo, as its Agent, and the lawyers, Silvana Lucía Gómez Salazar and Nilda Peralta Zecenarro, as deputy agents.

[4] The State presented a "preliminary observation" and five "procedural questions," two of which were addressed at contesting the Court's jurisdiction as follows: (a) "Lack of jurisdiction of the IACtHR to assume the role of fourth instance," and (b) "Observations on the undue inclusion of arguments on the presumed violation of the right to work in the pleadings and motions brief."

[5] This was validated in a brief of December 12, 2019, with a power of attorney granted by the presumed victim.

[6] In this order, the statements of the following persons were admitted: (a) Julio Casa Nina (presumed victim, proposed by the representative), and (b) Rita Arleny Figueroa Vásquez (witness, proposed by the State). In addition, the President ordered the incorporation "as documentary evidence, of the opinion that the expert, Perfecto Andrés Ibáñez, had provided during the processing of the case of *Martínez Esquivia v. Colombia." Cf. Case of Casa Nina v. Peru.* Order of the President of the Inter-American Court of Human Rights of August 3, 2020. Available at: https://www.corteidh.or.cr/docs/asuntos/casa_nina_03_08_20.pdf.

12. *Observations on the annexes to the final arguments.* On October 30, 2020, the State presented its observations on the annexes to the final written arguments of the representative. And, on November 2, 2020, the representative presented her observations on the annexes to the State's final written arguments. On the same date, the Commission indicated that it had no comments to make in this regard.

13. The Court deliberated this judgment virtually on November 23 and 24, 2020.[7]

III
JURISDICTION

14. The Court has jurisdiction to hear this case, pursuant to Article 62(3) of the Convention because the Republic of Peru has been a State Party to this instrument since July 28, 1978, and accepted the contentious jurisdiction of the Court on January 21, 1981.

IV
PRELIMINARY OBJECTIONS

15. In the instant case, the State filed two preliminary objections on the following issues: (a) the preliminary objection of "fourth instance," and (b) the Court's lack of jurisdiction to examine arguments concerning the right to work.

A. Preliminary objection of "fourth instance"

A.1. Arguments of the parties and the Commission

16. The ***State*** argued that the inter-American system for the protection of human rights contributes, and is subsidiary and complementary, to the internal jurisdiction of the States so that, as the Court has indicated on previous occasions, it lacks jurisdiction to act as a higher court to rule on disagreements regarding the assessment of evidence, because the examination of the facts and the evidence corresponds to the domestic courts. It argued that it had filed the preliminary objection of fourth instance twice during the admissibility stage before the Commission.

17. The State indicated that the matter debated in the instant case had "clearly been settled" at the domestic level by a judgment of the Constitutional Court of December 14, 2005 (*sic*).[8] However, since the presumed victim did not agree with the assessments and rulings made by the domestic jurisdictional organs, he was seeking for the Court to act as a fourth instance; that is, to intervene and to rule on the dispute. Lastly, the State argued that the Court lacked jurisdiction to hear the case since the presumed victim had resorted to the inter-American system because he disagreed with the decisions taken internally.

18. The ***representative*** argued that the matter submitted to the Court's consideration did not concern the assessment of the evidence or internal differences or disputes. To the contrary, it related to the State's violation of human rights protected by both domestic and supranational law.

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[7] Owing to the exceptional circumstances resulting from the COVID-19 pandemic, this judgment was deliberated and adopted during the 138th regular session, which was held virtually using technological means as established in the Court's Rules of Procedure.

[8] The judgment of the Constitutional Court was issued on November 14, 2005. *Cf.* Judgment handed down by the First Chamber of the Constitutional Court on November 14, 2005 (evidence file, volume I, annex 9 to the Merits Report, folios 32 and 33).

19. The ***Commission*** indicated that, in the instant case, a series of violations of due process and the principle of legality were alleged in the proceedings that culminated with the removal of the presumed victim from his post in the Prosecution Office; therefore, it was not a matter that referred merely to a disagreement with domestic decisions. It added that the debate on the reasons that led it to conclude that the said violations had been committed corresponded to the merits of the matter and this could never be decided by a preliminary objection. It asked the Court to reject the preliminary objection of fourth instance.

A.2. Considerations of the Court

20. The Court has indicated that the determination of whether the actions of judicial organs constitute a violation of the State's international obligations may result in the Court having to examine the respective internal proceedings to establish their compatibility with the American Convention.[9] However, this Court is not a fourth instance to conduct a judicial review or to examine the assessment of the evidence made by the domestic judges. It is only competent to decide on the content of judicial decisions that contravene the American Convention in a way that is plainly arbitrary.[10]

21. In this specific case, the Court notes that the claims of the Commission and the presumed victim are not confined to the review of the rulings of the domestic courts owing to a possible error in the assessment of the evidence, the determination of the facts, or the application of domestic law. To the contrary, they argue that various rights established in the American Convention were violated in the context of the decisions taken by the domestic authorities, in both the administrative and the judicial sphere. Consequently, in order to determine whether the said violations truly occurred, it is essential to analyze the decisions issued by the different administrative and jurisdictional authorities in order to determine their compatibility with the State's international obligations and, ultimately, this relates to a substantive issue that cannot be settled by means of a preliminary objection. Consequently, the Court declares the preliminary objection presented by the State inadmissible.

B. The Court's lack of jurisdiction to examine arguments concerning the right to work

B.1. Arguments of the parties and the Commission

22. The ***State*** argued that a violation of the right to work was mentioned several times in the pleadings and motions brief, although this had not been considered in either the Admissibility Report or the Merits Report. It indicated that Article 19(6) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, known as the "Protocol of San Salvador," delimited the competence of the Commission and of the Court in the sense that the organs of the inter-American system for the protection of human rights could only examine trade union rights (Article 8(a)) and the right to education (Article 13). It argued that the Court could not assume competence with regard to the presumed violation of a right or freedom that was not included under the protection system of the Convention and the Protocol of San Salvador. It added that the Court should "reconsider and reflect on the criteria previously established in the case of *Lagos del Campo v. Peru,*" as regards the interpretation of Article 26 of the Convention.

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[9] *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*. Judgment of November 19, 1999. Series C No. 63, para. 222, and *Case of Urrutia Laubreaux v. Chile. Preliminary objections, merits, reparations and costs*. Judgment of August 27, 2020. Series C No. 409, para. 31.

[10] *Cf. Case of Rico v. Argentina. Preliminary objection and merits.* Judgment of September 2, 2019. Series C No. 383, para. 82, and *Case of Urrutia Laubreaux v. Chile*, *supra*, para. 31.

23. It argued that, in the instant case, the only allegation concerning the principle of progressive development of the economic, social and cultural rights was contained in the pleadings and motions brief. Therefore, the Commission had not ruled in this regard and, consequently, it was not pertinent to analyze this. It asked the Court to reject the claim concerning the violation of the right to work.

24. The ***representative*** argued that the allegation concerning the violation of the right to work was related to the factual grounds of the case so that there could be no limitation to its analysis. She added that, in the case of *Lagos del Campo v. Peru*, the Court had asserted that the right to work was protected by the American Convention, considering that the civil and political rights and those of an economic, social and cultural nature should be understood integrally, without any hierarchy among them, and were therefore enforceable in all cases before the authorities with competence to protect them.

25. The ***Commission*** indicated that the representatives or the presumed victims are able to cite the violation of rights other than those included in the Merits Report, provided that these related to the facts contained in the latter. It added that "this was not the right moment to question the […] Court's case law on the violation of Article 26 [of the Convention]," because the Court itself had reiterated that the broad terms in which the American Convention was drafted indicated that it had full jurisdiction over all its articles and provisions. It asked the Court to reject this preliminary objection.

B.2. Considerations of the Court

26. The Court reaffirms its competence to examine and decide disputes relating to Article 26 of the American Convention as an integral part of the rights listed in its text, regarding which Article 1(1) establishes obligations of respect and guarantee.[11] As indicated in previous decisions,[12] the considerations related to the possible occurrence of such violations must be examined when analyzing the merits of the matter.

27. Furthermore, in response to the State's arguments, it should be added that the Court has repeatedly considered that the representatives or the presumed victims may invoke rights other than those indicated by the Commission, because as the latter are entitled to all the rights established in the American Convention, denying them this possibility would entail an

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[11] *Cf. Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2009. Series C No. 198, paras. 16, 17 and 100*; Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 340, paras. 142 and 154; *Case of the Discharged Employees of PetroPeru et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2017. Series C No. 344, para. 192; *Case of San Miguel Sosa et al. v. Venezuela. Merits, reparations and costs.* Judgment of February 8, 2018. Series C No. 348, para. 220; *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349, para. 100; *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, paras. 75 to 97; *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375, paras. 34 to 37; *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 21, 2019. Series C No. 394, paras. 33 and 34; *Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2019. Series C No. 395, para. 62; *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, reparations and costs.* Judgment of February 6, 2020. Series C No. 400, para. 195; *Case of Spoltore v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of June 9, 2020. Series C No. 404, para. 85, and *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of July 15, 2020. Series C No. 407, para. 23.

[12] *Cf. Case of Muelle Flores v. Peru*, *supra*, para. 37, and *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil*, *supra*, para. 23.

undue restriction of their condition as subjects of international human rights law. Nevertheless, the Court's case law requires that the said allegations must be based on the factual framework established in the Merits Report.[13] Consequently, the Court finds this preliminary objection inadmissible.

V
PRELIMINARY CONSIDERATIONS

A. Determination of presumed victims

A.1. Arguments of the parties and the Commission

28. The ***State*** argued that the Court had established that it was an obligation of the Commission to identify the presumed victims and that this should be done in the Merits Report; accordingly, it was not possible to include other presumed victims at a later stage. In its Merits Report, the Commission had only recognized Julio Casa Nina as a presumed victim. However, other individuals were included in the pleadings and motions brief – Mr. Casa Nina's wife and daughters – although, based on the Court's case law, they could not be considered as such and there were no grounds for the exception established in Article 35(2) of the Court's Rules of Procedure. It asked the Court to declare that it was not possible to include presumed victims other than Mr. Casa Nina.

29. The ***representative*** argued that reparation for human rights violations should be integral and should therefore encompass the members of the victim's family; to this end, it was necessary to take into account different international standards concerning the rights of victims to obtain reparations. The ***Commission*** did not comment in this regard.

A.2. Considerations of the Court

30. The Court recalls that, pursuant to Article 35(1) of the Rules of Procedure, the case is submitted to its jurisdiction by the presentation of the Merits Report, which must contain the identification of the presumed victims. Consequently, it is for the Commission to identity the presumed victims precisely and at the opportune procedural moment,[14] save in the exceptional circumstances established in Article 35(2) of the said Rules of Procedure, according to which, when it has been justified that it has not been possible to identify one or more presumed victims, in cases of massive or collective violations, the Court will duly decide whether or not to consider them as such, based on the nature of the violation.[15]

31. Therefore, in application of the said Article 35(1) of the Rules of Procedure and since none of the exceptions established in Article 35(2) are present, the Court concludes that it is not viable to include other presumed victims than the one identified in the Merits Report: that is, Julio Casa Nina.

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[13] *Cf. Case of the "Five Pensioners" v. Peru. Merits, reparations and costs.* Judgment of February 28, 2003. Series C No. 98, para. 155, and *Case of López et al. v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of November 25, 2019. Series C No. 396, para. 196.

[14] *Cf. Case of the Ituango Massacres v. Colombia. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2006. Series C No. 148, para. 98, and *Case of Olivares Muñoz et al. v. Venezuela. Merits, reparations and costs.* Judgment of November 10, 2020. Series C No. 415, para. 20.

[15] *Cf. Case of the Río Negro Massacre v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of September 4, 2012. Series C No. 250, para. 48, and *Case of Olivares Muñoz et al. v. Venezuela*, *supra*, para. 20.

B. The factual framework of the case

B.1. Arguments of the parties and the Commission

32. The ***State*** argued, under the heading of "preliminary observations," that the Commission, "has erroneously distorted the meaning of this case and has raised legal issues that, strictly speaking, bear no relationship to the facts." It underlined that the removal of Mr. Casa Nina from his post "did not occur owing to the application of a sanction; consequently, no disciplinary procedure has been conducted." In this regard, it argued that he had not been removed, terminated or dismissed; merely, his designation as Provisional Deputy Prosecutor of the Second Provincial Criminal Prosecution Office of Huamanga, Ayacucho, had concluded. The State asked the Court to establish and delimit the central fact of the dispute in order to determine the legal positions assumed by the parties and, if necessary, the legal grounds that would be the basis for its ruling.

33. The ***representative*** indicated that the Merits Report delimited "clearly" the purpose of the dispute. Meanwhile, the ***Commission*** indicated that the State's argument "does not really refer to the delimitation of the factual framework, but rather to a discrepancy with the legal characterization" made in the Merits Report. It added that the said factual framework of this case is "clearly delimited and is constituted by the proceedings that culminated with the victim's removal from his post of Provisional Deputy Prosecutor of the Second Criminal Prosecution Office of the province of Huamanga." It asked the Court to reject the State's position.

B.2. Considerations of the Court

34. The Court recalls that the factual framework of the proceedings is constituted by the facts contained in the Merits Report submitted to its consideration.[16] In this regard, as indicated by the Commission, the State's argument did not object directly to the delimitation of the factual framework, but rather to the Merits Report's categorization of those facts. Specifically, it contested the affirmation that the termination of the post occupied by the presumed victim was the result of a sanction and, therefore, denied that he had been removed, terminated or dismissed. In any case, these aspects are related to the legal arguments on the characterization of the facts, elements that undoubtedly form part of the in-depth analysis that the Court will make.

VI
EVIDENCE

A. Admissibility of the documentary evidence

35. The Court received diverse documents presented as evidence by the Commission and the parties with their principal briefs (*supra* paras. 1, 7 and 8). As in other cases, the Court admits those documents presented at the proper procedural moment (Article 57 of the Rules of Procedure)[17] by the parties and the Commission, the admissibility of which was not

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[16] *Cf. Case of Vera Vera et al. v. Ecuador. Preliminary objection, merits, reparations and costs.* Judgment of May 19, 2011. Series C No. 226, para. 32, and *Case of Urrutia Laubreaux v. Chile*, *supra*, para. 39.

[17] In general the documentary evidence should be presented pursuant to Article 57(2) of the Rules of Procedure, together with the briefs submitting the case or with pleadings and motions, or with the answering brief, as applicable, and evidence submitted outside these procedural opportunities is inadmissible, save in the case of the exceptions established in the said Article 57(2) of the Rules of Procedure (namely, *force majeure* or grave impediment) or if it relates to a supervening fact; that is, one that occurred after the said procedural moments.

contested or challenged and the authenticity of which was not questioned.[18]

36. The Court observes that, together with her final written arguments, the representative presented vouchers for expenses incurred for the psychological report prepared by Harvis Andrana Cordero Loayza, and for the expert opinion signed by Vladimir Díaz Pillaca. Both documents were forwarded as annexes to the pleadings and motions brief. When presenting its observations, the State indicated, among other matters, that the presentation of the vouchers was time-barred. The State also presented annexes to its final written arguments.[19] The representative, in her observations, questioned the usefulness and pertinence of the documents sent by the State. The Commission indicated that it had no comments to make in this regard.

37. The Court recalls that, regarding the procedural opportunity for the presentation of documentary evidence, pursuant to Article 57(1) of the Rules of Procedure this should generally be presented together with the briefs submitting the case or with pleadings and motions, or with the answering brief, as applicable. Consequently, the Court reiterates that evidence forwarded outside the appropriate procedural opportunities is inadmissible, save in the case of the exceptions established in Article 57(2) of the Rules of Procedure; namely, *force majeure,* grave impediment, or if it relates to a fact that took place after the said procedural moments.[20] The Court points out that the expenses supported by the vouchers presented as annexes to the representative's final written arguments had been incurred before the presentation of the pleadings and motions brief and, despite this, were not sent together with that document. Consequently, the said vouchers will not be taken into consideration when calculating the costs and expenses. In the case of the documents presented by the State with its final written arguments, the Court notes that their time-barred presentation was not justified by any of the exceptional reasons established in the Rules of Procedure, and they were not expressly requested by the Court as helpful evidence; therefore, they will not be taken into consideration. For the same reasons, the Court will not take into account the documents forwarded by the representative when submitting her observations on the annexes to the State's final written arguments.

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[18] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4, para. 140, and *Case of Mota Abarullo et al. v. Venezuela. Merits, reparations and costs.* Judgment of November 18, 2020. Series C No. 417, para. 27.

[19] The State forwarded the following documents: (a) Decree Law No. 25418 of April 6, 1992, Law establishing the foundations for the National Emergency and Reconstruction Government; (b) Decree Law No. 25505 of May 20, 1992, Appointment of Provisional Prosecutor General; (c) Law No. 26695 of November 29, 1996, Expansion of the authority of the President of the Supreme Court of Justice and adoption of various rules on the composition and term limits of the executive committees of the Judiciary and the Public Prosecution Service; (d) Resolution No. 3893-2018-MP-FN of the Prosecutor General of October 30, 2018, amended by Resolution No. 1974-2019-MP-FN of the Prosecutor General of July 26, 2019, Regulations for the Organization and Functions of the Public Prosecution Service – Prosecutor General's Office; (e) Resolution No. 035-96-MP-FNCEMP of the Executive Committee of the Public Prosecution Service of July 12, 1996, amended by Resolution No. 335-98-MP-CEMP of the Executive Committee of the Public Prosecution Service of April 24, 1998; (f) Law No. 27368 of November 7, 2000, which amends or re-establishes articles of the Organic Law of the National Council of the Judiciary and requires that a national competitive selection procedure be held for judges of the Judiciary and of the Public Prosecution Service; (g) Resolution No. 041-2000-CNM of the National Council of the Judiciary of November 20, 2000, Regulations of the competitive selection procedure for the appointment of judges and prosecutors; (h) Resolution No. 076-2002-P-FSDDJ-A of August 23, 2002, Public Prosecution Service; (i) Management Resolution No. 449-2003-MP-FN-GECPER of April 29, 2002, Public Prosecution Service; (j) Role of prosecutors at the national level who will operate in accordance with their terms of reference on April 9, 2000, in compliance with Resolution No. 227-2000-MPCEMP of April 3, 2000; (k) Supreme Decree No. 353-2019-EF of November 29, 2019, adopting salary rates and allowances for the jurisdictional function of the supernumerary judges of the Judiciary who do not form part of the judicial career, and provisional prosecutors of the Public Prosecution Service who do not form part of the prosecutorial career, and (l) Resolution No. 2772-2015-MP-FN of June 10, 2015, of the Prosecutor General

[20] *Cf. Case of the Barrios Family v. Venezuela. Merits, reparations and costs.* Judgment of November 24, 2011. Series C No. 237, para. 17, and *Case of Mota Abarullo et al. v. Venezuela*, *supra*, para. 27.

B. Admissibility of the testimonial and expert evidence

38. The Court finds it pertinent to admit the statements provided by affidavit,[21] insofar as they are in keeping with the purpose defined by the President in the order requiring them and the purpose of this case.[22]

39. The Court notes that the affidavit made by Julio Casa Nina was sent on September 11, 2020, eight days after the respective time limit.[23] The representative justified the delay by the circumstances derived from the restrictions imposed by the Peruvian State in Supreme Decree 146-2020-PCM based on the "national and global state of emergency […] due to the uncontrollable propagation of the COIVD-19 pandemic." Travel restrictions were imposed in the deponent's place of residence and, added to his situation as a "vulnerable person with risk factors for contagion" in view of his age and the ailments from which he suffered, "the State […] ha[d] expressly prohibited [him] from going out." In this regard, she forwarded a medical certificate on Mr. Casa Nina's health. When submitting its final arguments, the State indicated that the time-barred submission of the statement meant that it was inadmissibility and that, if it should be admitted, it should be assessed "with the appropriate prudence."

40. The Court notes that, although the representative initially advised that she had not received the questions that the State wished to ask the presumed victim, she subsequently justified the delay in the submission of Mr. Casa Nina's statement by the measures adopted by the Peruvian State that restricted mobility owing to the COVID-19 pandemic. The Court considers that the latter justification for the impossibility of presenting the statement within the allotted time frame is reasonable and supported by reasons of *force majeure*.[24] Consequently, it admits the presumed victim's affidavit, insofar as it is in keeping with the purpose defined by the President in the aforementioned order of August 3, 2020, requiring it.

VII
FACTS

41. Based on the factual framework determined by the Commission and the evidence provided, the Court will establish the facts of this case as follows: (a) applicable legal framework; (b) appointments of Julio Casa Nina as Provisional Deputy Provincial Prosecutor; (c) Termination of the presumed victim's appointment; (d) appeal mechanisms filed by the presumed victim; d.1) Appeal for review; d.2) Application for amparo; d.3) Remedy of appeal, and d.4) Appeal lodged before the Constitutional Court

A. Applicable legal framework

42. Article 158 of the Peruvian Constitution[25] stipulates:

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[21] The Court received the statement of Rita Arleny Figueroa Vásquez (witness proposed by the State) within the established time frame.

[22] The purposes of the statements were established in the order of the President of the Court of August 3, 2020.

[23] The order of the President of the Court of August 3, 2020, required that "[t]he requested statements must be presented to the Court by September 3, 2020, at the latest" (fourth operative paragraph).

[24] See, Declaration of the Inter-American Court of April 9, 2020, "Covid-19 and Human Rights: The problems and challenges that must be addressed from the perspective of human rights and respect for international obligations." Available at: https://www.corteidh.or.cr/tablas/alerta/comunicado/cp-27-2020.html.

[25] Peruvian Constitution, promulgated on December 29, 1993. Available at: http://spij.minjus.gob.pe/content/publicaciones_oficiales/img/Constitucion-Politica-2016.pdf. Articles 150 and 154 of the text in force at the time of the events established:

> Article 150. The National Council of the Judiciary is responsible for the selection and appointment of judges and prosecutors, except when they are elected by the people.

> The Public Prosecution Service is autonomous. The Prosecutor General is its head. He is elected by the Board of Supreme Prosecutors. The Prosecutor General is elected for a term of three years that may be extended, following re-election, but only for another two years. The members of the Public Prosecution Service have the same rights and prerogatives and are subject to the same obligations as the members of the Judiciary in the respective category. They are ruled by the same incompatibilities. Their appointment is subject to identical requirements and procedures as those of the members of the Judiciary in their respective category.

43. Article 64 of Legislative Decree No. 052, Organic Law of the Public Prosecution Service,[26] stipulates:

> Representation of the Public Prosecution Service by the Prosecutor General. The Prosecutor General represents the Public Prosecution Service. His/her authority extends to all the members of this Service, whatsoever their category and special functional activity.

44. Law No. 26738,[27] in force at the time of the events, amended Law No. 26623[28] by authorizing the Executive Committee of the Public Prosecution Service to designate prosecutors on a provisional basis. Article 1 of Law No. 26738 regulates this:

> Add the following paragraphs to the Third Transitory, Complementary and Final Provision of Law No. 26623: […]
>
> i. To designate provisionally Provincial, Superior and Supreme Prosecutors in posts that are vacant, filling these from among the representatives of the Public Prosecution Service; also, to designate provisionally, on the same basis, new posts at all levels as well as the respective deputy prosecutors.

45. Law No. 26898, a law which specifies the duties and rights of judges of the Judiciary and members of the Public Prosecution Service,[29] establishes the following:

> The National Council of the Judiciary is independent and ruled by its Organic Law.
>
> Article 154. The functions of the National Council of the Judiciary are:
>
> 1. To appoint, following an open public competitive selection procedure based on merits and a personal evaluation, judges and prosecutors of all levels. Such appointments require the vote of two-thirds of the legal number of its members. […]

[26] Legislative Decree No. 052, Organic Law of the Public Prosecution Service, promulgated on March 16, 1981. Available at: https://cdn.www.gob.pe/uploads/document/file/1115895/ley_organica_ministerio_publico.pdf. According to the text in force at the time of the events, articles 27 and 29 of the law regulated the following:

> Article 27. Replacement of prosecutors owing to leave of absence of more than sixty (60) days. If the leave of absence is granted or extended for more than sixty days, and also in the case of the suspension from office referred to in article 184 of the Constitution, the Prosecutor General shall be replaced by the person who follows him/her in seniority. In the case of a Supreme Prosecutor, the Prosecutor General shall call on the most senior of the Superior Prosecutors specialized in the same area.
>
> If the post to cover is that of a Superior Prosecutor, the most senior Provincial Prosecutor will be called on to fill it, based on the civil or criminal nature of the functions to be performed. And, if it is necessary to replace a Provincial Prosecutor, the respective Deputy will be called on to fill the post provisionally.
>
> Article 29. Remuneration of the provisional prosecutor. Provisional prosecutors will receive the remuneration corresponding to the post they are filling, while their appointment lasts. This will be stipulated in the order issued by the Prosecutor General.

[27] Law No. 26738, promulgated on January 7, 1997. Available at: https://peru.justia.com/federales/leyes/26738-jan-7-1997/gdoc/.

[28] Law No. 26623, promulgated on June 18, 1996. Available at: https://docs.peru.justia.com/federales/leyes/26623-jun-18-1996.pdf. In its Second Transitory, Complementary and Final Provision, this law declared that. "on re-organizing the Public Prosecution Service," certain articles of the Organic Law of the Public Prosecution Service (Legislative Decree No. 052) would be suspended and established that "[t]he functions of administration and management of the Public Prosecution Service w[ould] be assumed by the Executive Committee of the Public Prosecution Service." This provision was later amended by Law No. 26695, promulgated on December 2, 1996. Available at: https://peru.justia.com/federales/leyes/26695-dec-2-1996/gdoc/.

[29] Law No. 26898, which establishes the duties and rights of magistrates of the Judiciary and of the Public Prosecution Service, promulgated on December 10, 1997. Available at: https://docs.peru.justia.com/federales/leyes/26898-dec-12-1997.pdf. Article 3 of this law established:

> Article 4. Articles 29 and 37 of Legislative Decree No. 052, Organic Law of the Public Prosecution Service, are amended and will now read as follows:
>
> "Article 29. The Provincial, Superior and Supreme Prosecutors who are designated on a provisional basis in any of the organs of the Public Prosecution Service established in article 36 shall have the same duties, rights, attributions, prerogatives, prohibitions and incompatibilities as the tenured Prosecutors in their respective categories while their status remains provisional, both as the person responsible for public prosecutions and in institutional and administrative operations. […]."

46. Meanwhile, Law No. 27362, which annulled the homologation of tenured and provisional magistrates of the Judiciary and of the Public Prosecution Service,[30] derogated Law No. 26898 and its article 5 stipulated the following:

> Delimitation of the functional sphere of provisional magistrates. Provisional magistrates may only exercise jurisdictional work while their temporary posting lasts. They are prevented from assuming any administrative or representative function.

B. Appointments of Julio Casa Nina as Provisional Deputy Provincial Prosecutor

47. On May 20, 1998, Julio Casa Nina, 37 years of age, wrote to the President of the Executive Committee of the Public Prosecution Service indicating that he was a practicing lawyer "with his own office" and asked that he "be considered [as a candidate] for a vacant post for [deputy prosecutor] in the judicial districts […] throughout the country." To this end, he attached, among other documents, his curriculum vitae, a copy of his law degree, sworn statements and various certifications from the public records.[31]

48. By Resolution No. 464-98-MP-CEMP of the Executive Committee of the Public Prosecution Service[32] of June 30, 1998, Julio Casa Nina was appointed Provisional Deputy Provincial Prosecutor of the Joint Provincial Prosecution Service of La Mar, Judicial District of Ayacucho. The resolution established:

> Whereas:
> The post of Deputy Provincial Prosecutor of the Joint Provincial Prosecution Service of La Mar, Judicial District of Ayacucho, is vacant.
> Julio Casa Nina has presented his candidacy […]; by virtue of the powers conferred by Laws Nos. 26623, 26695 and 26738;
>
> It is decided:

> While the Public Prosecution Service is being reorganized, the Executive Committee of the Public Prosecution Service is authorized to designate the provisional Provincial, Superior and Supreme Prosecutors required for the efficient performance of their functions to uphold legality, civil rights, and public interests, as well as the prosecution of any type of crime, contributing to lighten the procedural load in the interests of a prompt and opportune administration of justice in the country. This authority extends to the designation of the respective Deputy Prosecutors.

[30] Law No. 27362, which annulled the homologation of tenured and provisional magistrates of the Judiciary and of the Public Prosecution Service, promulgated on October 30, 2000. Available at: https://docs.peru.justia.com/federales/leyes/27362-oct-30-2000.pdf. The law was applicable to the members of the Public Prosecution Service based on the content of article 158 of the Peruvian Constitution (*supra* para. 42).

[31] *Cf.* Letter sent by Julio Casa Nina to the President of the Executive Committee of the Public Prosecution Service on May 20, 1998 (evidence file, volume IV, annex 15 to the answering brief, folios 945 to 950).

[32] The State, in its answering brief, indicated that Mr. Casa Nina "was first designated on June 30, 1998, by the Executive Committee of the Public Prosecution Service, […] a body created under the reform process within the Peruvian State; however, [this appointment] was only valid from June 19, 1996, the date on which it was created by Law [No.] 26626 [*sic*] until it was deactivated by Law [No.] 27367 of November 3, 2000"; it added that, owing to the latter law, "the process of reorganization of the Public Prosecution Service was finalized and the functions of the institutions were full restored." Based on information provided by the State, the Court gathers that the Executive Committee of the Public Prosecution Service was created by Law No. 26623 (*supra* footnote 28).

First article. To appoint Julio Casa Nina as Provisional Deputy Provincial Prosecutor of the Joint Provincial Prosecution Service of La Mar, Judicial District of Ayacucho.[33]

49. By Resolution No. 565-2002-MP-FN of the Prosecutor General of April 8, 2002, "the appointment was ended" of the presumed victim as Provisional Deputy Provincial Prosecutor of the Joint Provincial Prosecution Service of La Mar, Ayacucho, and he was appointed Provisional Deputy Provincial Prosecutor of the Judicial District of Ayacucho, in the Second Provincial Criminal Prosecution Office of Huamanga. This Resolution indicated:

Whereas:

Due to needs for the service and in compliance with the provisions of article 64 of Legislative Decree No. 052, Organic Law of the Public Prosecution Service;

It [is decided]:

A[rticle 1]. To end the appointment of Julio Casa Nina, as Provisional Deputy Provincial Prosecutor of the Joint Provincial Prosecution Service of La Mar, Judicial District of Ayacucho […].

A[rticle 2]. To appoint Julio Casa Nina, as Provisional Deputy Provincial Prosecutor of the Judicial District of Ayacucho, in the Provincial Criminal Prosecution Office of Huamanga.[34]

C. Termination of the presumed victim's appointment

50. On January 21, 2003, by Resolution No. 087-2003-MP-FN, the Prosecutor General terminated the appointment of Julio Casa Nina as Provisional Deputy Provincial Prosecutor of the Judicial District of Ayacucho. To this end, he established:

Whereas:

The appointment of provisional prosecutors is temporary in nature, subject to the needs for the service and in compliance with the provisions of article 64 of Legislative Decree No. 052, Organic Law of the Public Prosecution Service;

It [is decided]:

A[rticle 1]. To end the appointment Julio Casa Nina, as Provisional Deputy Provincial Prosecutor of the Second Provincial Criminal Prosecution Office of Huamanga, Judicial District of Ayacucho, […] without prejudice to any legal actions that may be pertinent based on complaints and accusations that are being processed.[35]

D. Appeal mechanisms filed by the presumed victim

D.1. Appeal for review

51. The presumed victim filed an appeal for review with the Prosecutor General with regard to Resolution No. 087-2003-MP-FN of January 21, 2003, terminating his appointment. Among other matters, he argued that, in order to terminate his appointment, an administrative proceeding was required in which, following a hearing, he was sanctioned, whereas the charges against him had been invalidated; therefore, he asked to be reinstated.[36]

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[33] *Cf.* Resolution of the Executive Committee of the Public Prosecution Service of June 30, 1998 (evidence file, volume I, annex 1 to the Merits Report, folio 4).

[34] *Cf.* Resolution of the Prosecutor General of April 8, 2002 (evidence file, volume IV, annex 16 to the answering brief, folio 953).

[35] *Cf.* Resolution of the Prosecutor General of January 21, 2003 (evidence file, volume I, annex 2 to the Merits Report, folio 6).

[36] *Cf.* Brief of the appeal for review of February 13, 2003 (evidence file, volume IV, annex 17 to the State's answering brief, folios 955 to 961).

52. On February 14, 2003, in Resolution No. 285-2003-MP-FN, the Prosecutor General rejected the appeal for review filed by the presumed victim indicating:

> Whereas:
>
> The appointment of provisional prosecutors is of a temporary nature and the arguments invoked by the appellant in his appeal for review in no way disprove the grounds for the Resolution […] of January 21, 2003, pursuant to the provisions of article 5 of Law 27362.
>
> When the said resolution was issued, two complaints against the appellant were being processed before the Decentralized District Commission for Internal Control.
>
> Therefore, based on article 64 of Legislative Decree 052, Organic Law of the Public Prosecution Service;
>
> It is decided:
>
> A[rticle 1]. To declare without merit the appeal for review filed by Julio Casa Nina against the Resolution No. 087-2003-MP-FN of the Prosecutor General of January 21, 2003, and it is hereby declared that the administrative proceedings have been exhausted.[37]

D.2. Application for amparo

53. Mr. Casa Nina filed an application for amparo against the Public Prosecution Service owing to the issue of Resolution No. 087-2003-MP-FN, alleging a violation of his rights to work, to due process, of defense, and to irremovability from office. In his application, among other matters, he argued that his appointment could not be terminated by a unilateral decision, without a justified reason, and that it required an administrative procedure respecting all the guarantees, that did not violate his right to defend himself.[38]

54. On April 19, 2005, the First Civil Court of Huamanga, Ayacucho, delivered judgment (Resolution No. 7), declaring the application for amparo unsubstantiated, considering, *inter alia*:

> That, since the applicant occupied the post of Deputy Provincial Prosecutor on a provisional basis and not as the incumbent, the decision adopted by the Prosecutor General in no way constitutes a disciplinary measure of dismissal from office as established in article 52 of the Organic Law of the Public Prosecution Service, Legislative Decree 052; therefore, the application must be rejected because no constitutional violation has been proved; in particular, considering that the same resolution that the applicant seeks to overturn specifies that the measure adopted is without prejudice to any pertinent legal actions based on the complaint and charge that are being processed; which means that these do not constitute the grounds for the resolution as the application alleges; […].[39]

D.3. Remedy of appeal

55. The presumed victim filed an appeal against the judgment of April 19, 2005. In response, the Civil Chamber of the Superior Court of Justice of Ayacucho, in a judgment (Resolution No. 13) of July 11, 2005, confirmed the decision that had been appealed, considering *inter alia*:

> […] the appellant seeks to argue rights that correspond to tenured prosecutors, appointed in keeping with the provisions of articles 150 and 154 of our Constitution, because the post that he was occupying […] as an appointment of trust was that of Provisional Deputy Provincial Prosecutor of the Second Provincial Criminal

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[37] *Cf.* Resolution of the Prosecutor General of February 14, 2003 (evidence file, volume I, annex 4 to the Merits Report, folio 12).

[38] *Cf.* Brief of the application for amparo of November 29, 2004 (evidence file, volume IV, annex 19 to the answering brief, folios 967 to 980).

[39] *Cf.* Judgment delivered by the Judge of the First Civil Court of Huamanga, Ayacucho on April 19, 2005 (evidence file, volume I, annex 7 to the Merits Report, folios 25 to 27).

Prosecution Office of Huamanga; in other words, a temporary post that, as such, does not give rise to rights other than those inherent in his post […].[40]

D.4. Appeal lodged before the Constitutional Court

56. Mr. Casa Nina lodged an appeal before the Constitutional Court and, in a judgment of November 14, 2005, its First Chamber declared "the complaint groundless." The Chamber considered, *inter alia*:

> 3. […] it is important to note, on the one hand, that article 27 of Legislative Decree 052, Organic Law of the Public Prosecution Service, establishes that if the incumbent's leave of absence is for more than 60 days, and when "[…] if it is necessary to replace a Provincial Prosecutor, the respective Deputy will be called on to fill the post provisionally." This provision accepts the existence of provisional prosecutors – as is the case of the appellant – in order to cover vacancies in the said entity; and, on the other hand, that article 5 of Law 27362, which annuls the homologation of the provisional and tenured magistrates of the Judiciary and the Public Prosecution Service, specifies that provisional magistrates may only exercise jurisdictional work while their temporary posting lasts.
>
> 5. […] this Chamber understands that substitute or provisional appointments, as such, constitute a situation that does not give rise to rights other than those inherent in the post "provisionally" occupied by a person who has not been appointed on a permanent basis. This being the case, the protection of rights cannot be sought before a constitutional court, when the person is not entitled to such rights because he has not been appointed pursuant to the provisions of articles 150 and 154 of the Constitution, but instead a function of a transitory nature on an interim basis.[41]

VIII
MERITS

57. This case concerns the alleged violation of various rights in relation to the proceedings that culminated in the removal of Julio Casa Nina from the post of Provisional Deputy Prosecutor of the Second Criminal Prosecution Office of the province of Huamanga, Ayacucho, Peru. The Court will now proceed to make the corresponding analysis as follows: (a) judicial guarantees, political rights and right to work, in relation to the obligations to respect and to ensure rights and to adopt domestic legal provisions, and alleged violations of the principle of legality, protection of honor and dignity, and equality before the law, and (b) right to judicial protection, in relation to the obligations to respect and to ensure rights.

VIII.1
JUDICIAL GUARANTEES, POLITICAL RIGHTS AND RIGHT TO WORK, IN RELATION TO THE OBLIGATIONS TO RESPECT AND TO ENSURE RIGHTS AND TO ADOPT DOMESTIC LEGAL PROVISIONS,[42] AND ALLEGED VIOLATION OF THE PRINCIPLE OF LEGALITY, THE PROTECTION OF HONOR AND DIGNITY, AND EQUALITY BEFORE THE LAW[43]

A. Arguments of the Commission and the parties

A.1. Enhanced stability for prosecutors

58. The ***Commission*** indicated that the principle of enhanced stability for judges was also applicable to prosecutors, "inasmuch as they play a complementary role to that of a judge in

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[40] *Cf.* Judgment delivered by the Civil Chamber of the Superior Court of Justice of Ayacucho on July 11, 2005 (evidence file, volume I, annex 8 to the Merits Report, folios 29 and 30).

[41] *Cf.* Judgment delivered by the First Chamber of the Constitutional Court on November 14, 2005 (evidence file, volume I, annex 9 to the Merits Report, folios 32 and 33).

[42] Articles 8, 23 and 26 of the American Convention in relation to Articles 1(1) and 2 of this instrument.

[43] Articles 9, 11 and 24 of the American Convention.

the administration of justice, contributing to criminal proceedings, investigating crimes, and also performing other functions of public interest." It argued that the integration of provisional prosecutors into "positions of trust" made their discretionary removal possible, and this undermined the independence that they should be ensured, because it made them vulnerable to removal based on the decisions they adopted, or due to arbitrary decisions of administrative or judicial entities. It added that what happened in the instant case, specifically the presumed victim's appointment, without any time limit or condition, but merely citing the general "needs for the service" was incompatible with the Convention.

59. The ***presumed victim*** indicated that, in the instant case, the State had not respected the guarantee of enhanced stability, which requires it to ensure that everyone who performs judicial functions should have tenure.

60. The ***State*** argued that the post occupied by the presumed victim was terminated because it was a temporary designation, without any evidence of internal or external pressures, or a context of the intervention of external entities affecting judicial independence, or that the temporary nature of the post that Mr. Casa Nina occupied had made him vulnerable to such pressure. It indicated that the standards cited by the Commission were established after 2005; in other words, they did not exist at the time of the facts. Added to this, those standards referred to judges, and there was no case law on the situation of prosecutors, especially "provisional non-tenured prosecutors."

61. It added that, in the instant case, no appointment had been made; rather it was a "provisional designation," without this diminishing the independence enjoyed by "provisional non-tenured prosecutors" while their temporary appointment lasted. It indicated that, as regards the length or conditions of the designation, even though this was not explicitly set out in the corresponding resolution, "owing to the nature of the provisional designation and the circumstances that led to it (the need for the service), it could be inferred that it would unfailingly end when the reasons for the designation disappeared."

A.2. Judicial guarantees and the principle of legality

62. The ***Commission*** argued that the instant case related to proceedings to determine certain rights, in which the rights and guarantees established in Articles 8(1), 8(2)(b), 8(2)(c) and 9 of the Convention were applicable. It indicated that the presumed victim was entitled to his removal from office being consistent with a formal disciplinary proceeding that ensured his right of defense, the principle of the presumption of innocence, and the principle of legality, and this did not occur. It argued that neither the decision removing the presumed victim from office nor the resolution that rejected his appeal for review included a statement of reasons, which made it impossible to understand the reasons that the authority had when issuing them.

63. The ***presumed victim*** indicated that the State had violated due process and the right of defense by deciding, unilaterally and arbitrarily to remove him from office, without any reason, without citing any cause and without undertaking the respective proceeding. He added that the resolution that determined the termination of his functions did not include the necessary reasoned justification for the decision, which made it an arbitrary expression of the power of the State, in clear violation of Article 8 of the Convention.

64. The ***State*** indicated that, following the conclusions of Mr. Casa Nina's second designation, he had had the opportunity to be heard and to exercise his right of defense because he had filed the appeal for review. It indicated that the right to due justification of decisions had not been violated because the arguments set out in the Resolution in which the Prosecutor General decided the appeal for review allowed the reasons and the legal provisions

on which this authority based herself to take her decision to be known.

A.3. Political rights

65. The ***Commission*** indicated that, in its case law, the Court had indicated that, when a judge's tenure was arbitrarily impaired, the right to have access to and remain in public office, under general conditions of equality established in Article 23(1)(c) was violated. It argued that this standard was also applicable to prosecutors, in light of the necessary application to them of the guarantee of enhanced stability. It indicated that the presumed victim was removed from office by a procedure that did not comply with the required minimum guarantees, so that it also violated his right to have access to and remain in public office under general conditions of equality. The presumed victim's ***representative*** did not present arguments on this point.

66. The ***State*** argued that, in the case of Mr. Casa Nina, the conditions of equality in access to public office had been met, and his designation concluded owing to the needs for the service and not as a result of a disciplinary proceeding in which due process had been violated; therefore, there had been no violation of the rights recognized in Article 23(1)(c) of the Convention in relation to Article 1(1) of this instrument.

A.4. Right to work

67. The ***presumed victim*** argued that the Peruvian Constitution recognized that work was a right, so that workers were protected on different levels, and this included the right to job stability. He indicated that the Constitutional Court had affirmed that, in the case of an "indeterminate employment relationship, a person may only be dismissed owing to due cause, duly verified." He added that the Prosecutor General had violated his right to work because she had removed him from the function that he had been performing without any reason. Notwithstanding the considerations regarding the preliminary objection filed by the State (*supra* paras. 22, 23 and 25), neither the ***Commission*** nor the ***State*** presented substantive allegations in relation to the presumed victim's arguments.

B. Considerations of the Court

68. In light of the meaning and conclusions of the arguments submitted by the parties and the Commission, it is essential, first, to clarify the recognition to prosecutors of the specific guarantees for judges, and then examine all the arguments submitted in this regard.

B.1. Specific guarantees to safeguard judicial independence and their applicability to prosecutors owing to the nature of their functions

69. In order to examine this matter, the Court will base itself on three premises: (i) the State's duty to ensure the provision of judicial services; (ii) the fundamental need that those who intervene in the provision of such services are tenured officials, with pre-established causes for removal or dismissal, and (iii) in exceptional cases in which the designation of provisional officials is required, the appointment, permanence and termination of the exercise of the function is subject to predetermined conditions (*infra* para. 81). Regarding the latter, in the case of *Martínez Esquivia v. Colombia,* this Court concluded that the guarantee of stability and irremovability of judges, for the purpose of safeguarding their independence, was applicable to prosecutors owing to the nature of their functions.[44] The Court will refer to its considerations in that case below.

[44] *Cf. Case of Martínez Esquivia v. Colombia. Preliminary objections, merits and reparations.* Judgment of October 6, 2020. Series C No. 412, paras. 95 and 96.

70. Regarding the specific functions of prosecutors, on different occasions the Court has stressed the need for States to ensure an independent and objective investigation[45] into human rights violations and into crimes in general, and has emphasized that the authorities responsible for the investigation must enjoy *de jure* and *de facto* independence which requires "not only hierarchical or institutional independence, but also real independence."[46]

71. The Court has also indicated that the requirements of due process established in Article 8(1) of the Convention, as well as the criteria of independence and objectivity also extend to the bodies responsible for the investigation conducted prior to the judicial proceedings in order to determine the existence of sufficient evidence for prosecuting a case; thus, if these requirements are not met, the State will be unable to exercise its prosecutorial powers effectively and efficiently and the courts will be unable to conduct the corresponding judicial proceedings.[47]

72. Based on the foregoing, the Court considers that the guarantees of an appropriate appointment, of tenure in office and of protection against external pressures also safeguard the work of prosecutors. Otherwise, the independence and objectivity required of their function would be jeopardized; principles aimed at ensuring that the investigations conducted and the charges filed before the jurisdictional organs are addressed exclusively at achieving justice in each case, consistent with the provisions of Article 8 of the Convention. In this regard, it should be added that the Court has stipulated that the absence of the guarantee of tenure for prosecutors, by rendering them vulnerable to reprisals for the decisions they take, results in a violation of the independence that Article 8(1) of the Convention ensures.[48]

73. This opinion is also supported by various international instruments and declarations. Indeed, the United Nations Guidelines on the Role of Prosecutors establishes the obligation of States to "ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability."[49]

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[45] *Cf. inter alia, Case of Bueno Alves v. Argentina. Merits, reparations and costs.* Judgment of May 11, 2007. Series C No. 164, para. 108; *Case of Isaza Uribe et al. v. Colombia. Merits, reparations and costs.* Judgment of November 20, 2018. Series C No. 363, para. 150, and *Case of Martínez Esquivia v. Colombia*, *supra*, para. 86. The following instruments also refer to these requirements among others: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, Article 12; Inter-American Convention to Prevent and Punish Torture, 1985, Article 8; United Nations Convention against Corruption, 2003, Article 11(2), and International Convention for the Protection of All Persons from Enforced Disappearances, 2006, Article 12. See also: Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, recommended by the United Nations Economic and Social Council in its Resolution 1989/65, of May 24, 1989, Principle 9; Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly in the annex to Resolution 55/89 of December 4, 2000, Principle 2, and Committee against Torture, General Comment No. 2, *Implementation of article 2 by States Parties*, CAT/C/GC/2, January 24, 2008, para. 26.

[46] *Cf. Case of Baldeón García v. Peru. Merits, reparations and costs.* Judgment of April 6, 2006. Series C No. 147, para. 95; *Case of Montero Aranguren et al. (Retén de Catia) v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of July 5, 2006. Series C No. 150, para. 81, and *Case of Martínez Esquivia v. Colombia*, *supra*, para. 86.

[47] *Cf. Case of Cantoral Huamaní and García Santa Cruz v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of July 10, 2007. Series C No. 167, para. 133; *Case of J. v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of November 27, 2013. Series C No. 275, para. 182, and *Case of Martínez Esquivia v. Colombia*, *supra*, para. 87.

[48] *Cf. Case of Valencia Hinojosa et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of November 29, 2016. Series C No. 327, paras. 110 and 119, and *Case of Martínez Esquivia v. Colombia*, *supra*, para. 88.

[49] *Cf.* Guidelines on the Role of Prosecutors, adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana, Cuba, from August 27 to September 7, 1990, UN Doc.

74. Also, the United Nations Special Rapporteurship on the independence of judges and lawyers has stressed that prosecutors "have a central role in the functioning of the rule of law" and that their independence "falls within the general scope of judicial independence," and the guarantee of this constitutes a State obligation.[50] Similarly, the Special Rapporteurship has indicated the following:

> 66. The United Nations Guidelines stipulate that prosecutors should enjoy reasonable conditions of service, including tenure, when appropriate, remuneration and pension commensurate with the crucial role they play in the administration of justice. […]
>
> 68. Another important element that should exist within their conditions of service is the irremovability of prosecutors. […]
>
> 70. Given their important role and function, the dismissal of prosecutors should be subject to strict requirements […]. There should be a framework for dealing with internal disciplinary matters and complaints against prosecutors, who should in any case have the right to challenge – including in court – all decisions concerning their career, including those resulting from disciplinary proceedings.[51]

75. In the European sphere, the Council of Europe has recommended that the governments of the States "take appropriate measures to ensure that public prosecutors are able to perform their professional duties and responsibilities without unjustified interference or unjustified exposure to civil, penal or other liability."[52] Also, the joint report issued by the Consultative Council of European Judges and the Consultative Council of European Prosecutors on "The relations between judges and prosecutors in a democratic society," known as the "Bordeaux Declaration," indicates:

> 8. For an independent status of public prosecutors, some minimal requirements are necessary, in particular: […] that their position and activities are not subject to influence or interference from any source outside the prosecution service itself; […] that their recruitment, career development, security of tenure including transfer, which shall be effected only according to the law or by their consent, as well as remuneration be safeguarded through guarantees provided by the law.
>
> 37. Respect for the above principles implies that the status of prosecutors be guaranteed by law at the highest possible level in a manner analogous to that of judges. The proximity and complementary nature of the missions of judges and prosecutors create similar requirements and guarantees in terms of their status and conditions of service, namely regarding recruitment, training, career development, discipline, transfer (which shall be effected only according to the law or by their consent), remuneration, termination of functions and freedom to create professional associations […].[53]

A/CONF.144/28/Rev.1, p. 189 (1990), Guideline 4. See also: United Nations Commission on Crime Prevention and Criminal Justice, *Strengthening the rule of law through improved integrity and capacity of prosecution services* (Resolution 17/2), and its annex: *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors,* adopted by the International Association of Prosecutors (IAP), April 23, 1999.

[50] *Cf.* Report of the Special Rapporteur on the independence of judges and lawyers, Diego García-Sayán, *Independence of judges and lawyers,* UN Doc. A/HRC/44/47, March 23, 2020, paras. 27 and 34. See also: Report of the Special Rapporteur on the independence of judges and lawyers, Sr. Leandro Despouy, UN Doc. A/HRC/11/41, March 24, 2009, para. 19, and Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, UN Doc. A/65/274, August 10, 2010, para. 18, which emphasize the independence that should be ensured to prosecutors in the performance of their functions. Consistent with this, Article 42(1) of the 1998 Rome Statute of the International Criminal Court stipulates: "The Office of the Prosecutor shall act independently as a separate organ of the Court. […]."

[51] *Cf.* Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19, June 7, 2012.

[52] *Cf.* Council of Europe. *Recommendation Rec(2000)19 of the Committee of Ministers to Members States on the Role of Public Prosecution in the Criminal Justice System*, adopted on October 6, 2000, para. 11.

[53] *Cf.* Report No. 12 (2009) of the Consultative Council of European Judges (CCJE) and Report No. 4 (2009) of the Consultative Council of European Prosecutors (CCPE) to the Committee of Ministers of the Council of Europe on ""The relations between judges and prosecutors in a democratic society." The European Commission for Democracy through Law (Venice Commission) has indicated that prosecutors should be appointed until retirement, because "appointments for limited periods with the possibility of re-appointment bear the risk that the prosecutor will make

76. For its part, the European Court of Human Rights has considered that "in a democratic society, both the courts and the investigation authorities must remain free from political pressure."[54] Similarly, in the *Case of Kövesi v. Romania*, that Court indicated that the dismissal of a prosecutor before the end of his mandate, as well as the reasons that justified the decision, "can hardly be reconciled with the particular consideration to be given to the nature of the judicial function as an independent branch of State power and to the principle of the independence of prosecutors, which — according to Council of Europe and other international instruments — is a key element for the maintenance of judicial independence."[55]

77. In the African system the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa stand out. They establish the obligation of States to ensure that "[p]rosecutors are able to perform their professional functions without intimidations, hindrance, harassment, improper interference or unjustified exposure to civil, penal, or other liability."[56]

78. It should be pointed out that prosecutors perform functions of agents of justice and, in this capacity, although they are not judges, they need to enjoy guarantees of job stability, among others, as a basic condition for the independence required for the proper fulfilment of their procedural functions.[57]

79. Ultimately, the Court concludes that, in order to safeguard the independence and objectivity of prosecutors in the exercise of their functions, they are also protected by the following guarantees: (i) of appropriate appointment; (ii) to irremovability from office, and (iii) to be protected from external pressures.[58]

80. Nevertheless, it must be pointed out that the independence of prosecutors does not suppose a specific model of institutional organization at the constitutional or legal level, due both to the position that has been recognized to the Prosecutor's Office, the Public Prosecution Service or any other name used in the internal legal system of each State, and to the organization and internal relationships of such institutions,[59] in the understanding that,

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his or her decisions not on the basis of the law but with the idea to please those who will re-appoint him or her." *Cf.* European Commission for Democracy through Law (Venice Commission). *European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service*, report adopted at its 85th plenary meeting (Venice, December 17 and 18, 2010), para. 50.

54 *Cf.* ECHR, *Case of Guja v. Moldova* [GS], No. 14277/04. Judgment of February 12, 2008, para. 86. The Court has also referred to the Independence that should be required in the investigation in cases of human rights violations. *Cf.* ECHR, *Case of Makaratzis v. Greece* [GS], No. 50385/99. Judgment of December 20, 2004, para. 73; *Case of Mustafa Tunç and Fecire Tunç v. Turkey* [GS], No. 24014/05. Judgment of April 14, 2005, para. 217, and *Case of Petrović v. Serbia*, No. 40485/08. Judgment of October 15, 2014, para. 73, among others.

55 *Cf.* ECHR, *Case of Kövesi v. Romania*, No. 3594/19. Judgment of August 5, 2020, para. 208.

56 *Cf. Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa,* adopted as part of the activities report of the African Commission at its Second Summit and Meeting of Heads of State of the African Union held in Maputo from July 4 to 12, 2003, Principle F(a)2.

57 *Cf. Case of Martínez Esquivia v. Colombia*, *supra*, para. 94.

58 *Cf. Case of Martínez Esquivia v. Colombia*, *supra*, para. 95.

59 A general overview of the basic regulation of the functions of prosecutors in the States that have accepted the contentious jurisdiction of the Inter-American Court results in the following classification: (1) States in which these functions are exercised by autonomous institutions whose internal organization is subject to the principle of hierarchy: (i) Argentine Republic, National Public Prosecution Service (Articles 120 of the Constitution and 2 of the Organic Law of the Public Prosecution Service); (ii) Plurinational State of Bolivia, Public Prosecution Service (Article 225 of the Constitution); (iii) Republic of Chile, Public Prosecution Service (Article 83 of the Constitution); (iv) Republic of El Salvador, Office of the Prosecutor General (Articles 191 of the Constitution and 5 of the Organic Law of the Public Prosecution Service); (v) Republic of Guatemala, Public Prosecution Service (Articles 251 of the Constitution and 5 of the Organic Law of the Public Prosecution Service); (vi) Republic of Honduras, Public Prosecution Service (Articles 1 and 5 of the Law of the Public Prosecution Service); (vii) Republic of Nicaragua, Public Prosecution Service (Articles

nevertheless, the independence recognized to prosecutors constitutes the guarantee that they will not be subject to political pressure or undue interference in their actions, or reprisals for the decisions that they have objectively taken, and this requires, specifically, the guarantee of tenure or irremovability from office.[60] Thus, this specific guarantee for prosecutors, applied in the same way as the protection mechanisms recognized for judges results in the following: (i) that removal from office is exclusively due to the permitted causes, either by a proceeding that complies with judicial guarantees or because the mandate has ended; (ii) that prosecutors can only be dismissed because of serious disciplinary offenses or incompetence, and (iii) that any process against prosecutors must be settled using fair, objective and impartial proceedings, pursuant to the Constitution or the law, because the discretionary removal of prosecutors gives rise to the objective doubt about their real possibility of exercising their functions without fear of reprisals.[61]

B.2. The guarantee of tenure for provisional prosecutors

81. The Court reiterates that it does not have competence to define the best institutional framework for ensuring the independence and objectivity of prosecutors.[62] However, it notes that States are bound to ensure that provisional prosecutors are independent and objective, and therefore should grant them some sort of stability and permanence in office, because the fact that they are appointed provisionally does not mean that they can be removed from office in a discretionary or arbitrary manner.[63] The Court notes that the provisional nature of the appointment should not modify in any way the safeguards instituted to guarantee the reliable performance of their functions and to benefit the litigants themselves. In any case, such provisional appointments should not be prolonged indefinitely and should be subject to a resolutive condition, such as the extinction of the case that resulted in the temporary absence or separation of the incumbent, or the expiry of a predetermined period and the holding and conclusion of a public competitive selection procedure whereby permanent replacements are

1 and 4 of the Organic Law of the Public Prosecution Service); (viii) Republic of Panama, Public Prosecution Service (Article 140 of the Constitution); (ix) Republic of Paraguay, Public Prosecution Service (Articles 266 of the Constitution and 6 of the Organic Law of the Public Prosecution Service); (x) Republic of Peru, Public Prosecution Service (Articles 158 of the Constitution and 5 of the Organic Law of the Public Prosecution Service), and (xi) Dominican Republic, Public Prosecution Service (Article 170 of the Constitution); (2) States in which the institution, with a hierarchical structure and with functional autonomy, forms part of the Judiciary: (i) Republic of Colombia, Office of the Prosecutor General (Articles 249 of the Constitution and 4 of Decree Law 016 of 2014); (ii) Republic of Costa Rica, Public Prosecution Service (Article 2 of the Organic Law of the Public Prosecution Service); (iii) Republic of Ecuador, Office of the Prosecutor General (Article 194 of the Constitution and 282 of the Organic Code of the Judicial Function), and (iv) Republic of Suriname, Public Prosecution Service (Articles 133 and 146 of the Constitution); (3) State in which the institution and its members are under the authority of the Executive Branch: Republic of Haiti, Public Prosecution Service (Article 35 of the Law on the Statute of the Judiciary); (4) States in which there are autonomous institutions and the functional or professional independence of prosecutors in the exercise of their functions is recognized: (i) Federative Republic of Brazil, National Public Prosecution Service (Article 127 of the Constitution), and (ii) United Mexican States, Office of the Prosecutor General (Articles 102 of the Constitution and 12 of the Organic Law of the Prosecutor General's Office), and (5) State in which the functions are exercised by a decentralized institution with functional autonomy and with recognition of professional independence of prosecutors in the exercise of their functions: (i) Oriental Republic of Uruguay (Articles 1 of Law No. 19334 and 5 of Law No. 19483).

60 *Cf.* Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19, June 7, 2012, para. 33: "[…] Within a horizontal structure, prosecutors generally enjoy more autonomy, while within a hierarchical structure, it is easier to align the application and interpretation of the law as well as a common approach to criminal justice policy, since there will be an objective, in the name of consistency, to ensure that common practices, procedures and policies are followed. […] In order to maintain their autonomy in hierarchically structured prosecution services, prosecutors should not be required to obtain approval for their actions in the exercise of their functions. […]."

61 *Cf. Case of Martínez Esquivia v. Colombia*, *supra*, para. 96.

62 *Cf. Case of Martínez Esquivia v. Colombia*, *supra*, para. 97.

63 *Cf. Case of Martínez Esquivia v. Colombia*, *supra*, para. 97.

selected. Provisional appoints should be exceptional, rather than the rule.[64] In addition (*infra* paras. 88 and 89), the decision that terminates the appointment of provisional prosecutors should be duly reasoned, to ensure the rights to due process and judicial protection.

82. The foregoing does not imply the equivalence of those appointed through a public competitive selection procedure and those appointed provisionally, because the latter are appointed for a limited period of time and subject to a resolutive condition. However, as explained in the preceding paragraph, within the framework of that appointment and until this resolutive condition or a serious disciplinary offense is verified, the provisional prosecutor should have the same guarantees as those with tenure, because their functions are identical and require the same protection against external pressures.[65]

83. In conclusion, the Court considers that the removal of a provisional prosecutor from office should be the result of legally defined caused, namely: (i) the occurrence of the resolutive condition to which the designation or appointment was subject, or the conclusion of a predetermined period of time for holding and concluding a public competitive selection procedure in order to appoint or designate the permanent replacement of the provisional prosecutor, or (ii) serious disciplinary offenses or proven incompetence, in which case it is necessary to conduct a procedures that complies with the due guarantees and that ensures the objectivity and impartiality of the decision.[66]

B.3. Analysis of this specific case

B.3.1. Appointment of Julio Casa Nina as a provisional prosecutor

84. Julio Casa Nina was appointed Provisional Deputy Provincial Prosecutor of the Joint Provincial Prosecution Service of La Mar, Judicial District of Ayacucho, by a Resolution of June 30, 1998. Subsequently, in a Resolution of April 8, 2002, this appointment was terminated and he was appointed Provisional Deputy Provincial Prosecutor of the Judicial District of Ayacucho, in the Second Provincial Criminal Prosecution Office of Huamanga. Neither of these resolutions specified the duration of the appointment or any other resolutive condition whose occurrence would determine the conclusion of the appointment or designation.[67]

85. In this regard, the Court reiterates that, in order to ensure the independence of prosecutors, provisional appointments should necessarily be exceptional (*supra* para. 81).[68]

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[64] *Cf. Case of Martínez Esquivia v. Colombia*, *supra*, para. 97. See also: *mutatis mutandis, Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of August 5, 2008, Series C, No. 182, para. 43, and *Case of Álvarez Ramos v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of August 30, 2019. Series C No. 380, para. 148.

[65] *Cf. Case of Martínez Esquivia v. Colombia*, *supra*, para. 98.

[66] *Cf. Case of Martínez Esquivia v. Colombia*, *supra*, para. 99.

[67] The Court takes note of the distinction that, according to the State, exists in domestic law with regard to the words "appointment" and "designation," which was also mentioned by witness Rita Arleny Figueroa Vásquez. In this regard, the witness indicated that the use of the former word, in relation to the employment status of Julio Casa Nina, "in no way changes the essence of the temporary nature of the post, always linked to the 'needs for the service.'" *Cf.* Statement made by Rita Arleny Figueroa Vásquez (evidence file, volume VI, affidavits, folio 1245). The same is true with regard to the difference between the expressions "termination of the designation" and "removal from office." Notwithstanding the distinction that the use of each expression may have under the Peruvian legal system, it is evident that the condition of provisional prosecutor – that is "non-career provisional prosecutor" (*infra* footnote 69) – is linked to a condition of impermanence in which its start (appointment or designation) and end (termination of the designation or removal from office) are determined based on "the needs for the service." For the aforementioned purposes, these expressions are used interchangeably in this judgment.

[68] In the case of the Peruvian State, in 2000, the Inter-American Commission emphasized that "more than 80% of the prosecutors in Peru [were] "provisional" (1,067 prosecutors, of a national total of 1,259), so that "the exception bec[ame] the rule" with the result that "the functions of the Public Prosecution Service [were] exercised mostly by

It also recalls that even in the case of provisional prosecutors, the safeguard of their independence requires the State to provide for an appropriate appointment process that determines the precise conditions for the performance of their functions and the causes for its termination, consistent with the nature of the functions that they will perform and to guarantee them a certain stability in the post, while they are occupying it.

86. Ultimately, the failure to specify any resolutive condition that would determine the termination of the appointment as a provisional prosecutor,[69] permits the Court to note that Mr. Casa Nina occupied the post without the security of tenure;[70] in other words, without an essential safeguard to ensure his independence.

B.3.2. Obligation to provide reasoned decisions, tenure, and termination of the appointment of Julio Casa Nina as a provisional prosecutor

87. In a Resolution of January 21, 2003, the Prosecutor General decided to terminate the appointment of Mr. Casa Nina as Provisional Deputy Provincial Prosecutor of the Judicial District of Ayacucho.[71] The Resolution considered that "the appointment of provisional prosecutors is of a temporary nature, subject to the needs for the service."[72] Consequently, the interested party filed an appeal for review, which the Prosecutor General declared without merit on February 14, 2003, reiterating that "the appointment of provisional prosecutors is of a temporary nature."[73] Based on the foregoing, the Court notes that both administrative acts briefly based the termination of Mr. Casa Nina's appointment on the temporary nature of the appointment and on the needs for the service.

88. Regarding the duty to provide a statement of reasons, the Court recalls that, in any

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persons who [were] not qualified for those posts, and they ha[d] not undergone periodic evaluations of their technical or ethical aptitude." *Cf.* IACHR. *Second report on the situation of human rights in Peru,* OEA/Ser.L/V/II.106, June 2, 2000, Chapter II, para. 36. Available at: http://www.cidh.org/countryrep/peru2000en/chapter2.htm.

69 The Court takes note of the distinction that exists in domestic law between "provisional prosecutors" and "non-career provisional prosecutors," understanding that the former are career prosecutors who, in the absence of a higher-ranking official, replace them provisionally (article 27 of Legislative Decree No. 052, Organic Law of the Public Prosecution Service, *supra* footnote 26), while the latter, based on the procedure designating them, do not belong to the prosecutorial career, a category into which it could be understood Mr. Casa Nina fell at the time of his appointment. According to witness Rita Arleny Figueroa Vásquez, the entry of a "non-career provisional prosecutor" into the institution was conditioned "to the presence of a vacancy, to the existence of the 'need for the service' […] and insofar as he demonstrated probity and aptitude in the performance of the function. The termination comes into effect when the 'need for the service' or the institutional budget concludes." She indicated that this is in accordance with Resolution No. 4330-2014-MP-FN of October 15, 2014, adopting the Regulations for the appointment, evaluation and permanence of provisional prosecutors throughout the country. *Cf.* Statement made by Rita Arleny Figueroa Vásquez (evidence file, volume VI, affidavits, folios 1243, 1244 and 1255). Notwithstanding the foregoing, this is a distinction of terms that arose following the facts of the instant case. Ultimately, what is important for deciding the dispute is the reference to the notion of the "needs for the service" as justification for the appointment or designation and for the termination of the execution of the function of the provisional prosecutor (that is, the "non-career provisional prosecutor," according to the said Resolution No. 4330-2014-MP-FN), as occurred in the case of Julio Casa Nina, a matter that was reiterated by the witness.

70 The witness Rita Arleny Figueroa Vásquez stated that "one of the rights of prosecutors is permanence in the service until they are seventy (70) years of age, pursuant to the Peruvian Constitution; however, in the case of the non-career provisional prosecutor this benefit cannot be required, because their permanence depends on the decision of the head of the Public Prosecution Service, that is, the Prosecutor General, because based on the 'needs for the service' the latter may terminate their 'designation.'" *Cf.* Statement made by Rita Arleny Figueroa Vásquez (evidence file, volume VI, affidavits, folio 1243).

71 Adding up the time spent in the two appointments, Mr. Casa Nina executed the functions of provisional prosecutor for a total of four years, six months and 21 days.

72 *Cf.* Resolution of the Prosecutor General of January 21, 2003 (evidence file, volume I, annex 2 to the Merits Report, folio 6).

73 *Cf.* Resolution of the Prosecutor General of February 14, 2003 (evidence file, volume I, annex 4 to the Merits Report, folio 12).

matter, including labor and administrative matters, the administration's discretionality has certain limits that cannot be exceeded, and one of them is respect for human rights.[74] The Court has also indicated that any public authority, whether administrative, legislative or judicial, whose decisions may affect the rights of an individual, is required to adopt the said decision with full respect for the guarantees of due process of law.[75] In this regard, Article 8 of the Convention establishes the guidelines for due process of law, which refers to the series of requirements that must be met in the procedural instances so that the individual is able to defend his rights adequately in relation to any act of the State that could infringe them.[76]

89. Consequently, the duty to state the reasons for resolutions is a guarantee related to the proper administration of justice protecting the right of the individual to be tried for the reasons established by law and providing credibility to legal decisions in a democratic society.[77] Therefore, decisions adopted by domestic bodies that could affect human rights should be duly justified; otherwise, they would be arbitrary decisions.[78] In this regard, the reasoning for a judgment and certain administrative acts should reveal the facts, reasons and norms on which the authority based its decision in order to eliminate any sign of arbitrariness.[79] In addition, a reasoned decision demonstrates to the parties that they have been heard and, when the decision is subject to appeal, it affords them the possibility of challenging it and having the decision reviewed by an appellate body.[80] Consequently, the duty to justify a decision is one of the "due guarantees" included in Article 8(1) to protect the right to due process.[81]

90. Therefore, as previously considered (*supra* para. 83), the removal from office of a provisional prosecutor must respond to: (i) the occurrence of the resolutive condition to which the designation or appointment was subject, or the conclusion of a predefined period of time for the holding and conclusion of a public competitive selection procedure for the appointment or designation of the permanent replacement of the provisional prosecutor, or (ii) because of serious disciplinary offenses or proven incompetence, following a procedure that complies with due guarantees and that ensures the objectivity and impartiality of the decision.

91. Based on the evidence provided to the case file, it cannot be argued that the procedure by which the appointment of Mr. Casa Nina was terminated was a disciplinary or a punitive procedure; nor is there any evidence to indicate that this decision was related to the holding of a competitive selection procedure or so that the post could be occupied by a career official. Therefore, the decision that terminated the presumed victim's appointment did not respond to the permitted causes to safeguard his independence in the discharge of his duties (*supra* paras. 81 to 83). Consequently, the administrative authority failed to respect the guarantee of irremovability, which resulted in a violation of the judicial guarantees established in Article

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74 *Cf. Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs.* Judgment of February 2, 2001. Series C No. 72, para. 126, and *Case of Martínez Esquivia v. Colombia*, *supra*, para. 105.

75 *Cf. Case of the Constitutional Court v. Peru. Merits, reparations and costs.* Judgment of January 31, 2001. Series C No. 71, para. 71, and *Case of Martínez Esquivia v. Colombia*, *supra*, para. 105.

76 *Cf. Case of the Constitutional Court v. Peru*, *supra*, para. 69, and *Case of Martínez Esquivia v. Colombia*, *supra*, para. 105.

77 *Cf. Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, *supra*, para. 77 and *Case of Martínez Esquivia v. Colombia*, *supra*, para. 106.

78 *Cf. Case of Yatama v. Nicaragua, Preliminary objections, merits, reparations and costs.* Judgment of June 23, 2005. Series C No. 127, para. 152, and *Case of Martínez Esquivia v. Colombia*, *supra*, para. 106.

79 *Cf. Case of Claude Reyes et al. v. Chile. Merits, reparations and costs.* Judgment of September 19, 2006. Series C No. 151, para. 122, and *Case of Martínez Esquivia v. Colombia*, *supra*, para. 106.

80 *Cf. Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, *supra*, para. 78 and *Case of Martínez Esquivia v. Colombia*, *supra*, para. 106.

81 *Cf. Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, *supra*, para. 78, and *Case of Martínez Esquivia v. Colombia*, *supra*, para. 106.

8(1) of the Convention.

92. In this specific case, the resolutions issued by the administrative authority to justify its decision to terminate the appointment indicate that the permanence of Mr. Casa Nina in the post of provisional prosecutor depended on what, in the administrative authority's opinion, was required and determined by "the needs for the service."[82] Thus, the said authority was empowered to decide in a discretionary manner when the institution would be able to dispense with his work as a provisional prosecutor and, consequently, decide on the termination of his designation or appointment.[83]

93. In the Court's opinion, the justification of the needs for the service invoked to remove Mr. Casa Nina denotes the application of an indeterminate legal concept; namely, one relating to an aspect of reality the limits of which were not clearly established by this expression. The application of this concept should respond to concrete circumstances clearly stated by the authority. Invoking the needs for the service does not merely entail mentioning the said expression; rather it should introduce a reasoned analysis of the specific circumstances involved.

94. In this regard, the Court understands that States may enjoy the prerogative of adapting the regime of their officials to the needs for their service in response to the principles of efficacy and efficiency. However, the standard of the needs for the service is too indeterminate to justify the termination of a provisional appointment that should have certain guarantees of stability. Consequently, the justification of the needs for the service does not provide a sufficient degree of predictability to be considered a resolutive condition;[84] therefore, as indicated previously (*supra* para. 91), the decision that terminated the appointment did not respond to the causes permitted in order to safeguard the independence of the provisional prosecutor in the performance of his functions.

95. It is worth pointing out that, although it has not been established that Mr. Casa Nina was in fact subject to pressures or interference of any type during the performance of his functions as a prosecutor, the discretionary removal of prosecutors raises objective doubts about the real possibility they have of performing their functions and taking decisions without fear of reprisals.[85]

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[82] The witness Rita Arleny Figueroa Vásquez stated, with regard to the conditions for Mr. Casa Nina's execution of the function, that "the resolutions designating him in the post that he temporarily occupied in the Public Prosecution Service contained a tacit resolutive condition: his permanence in the institution depended on the 'needs for the service.'" And, she added the following: "[…] the 'need' for the service is the reason for a designation by the Public Prosecution Service. Thus, the provisional nature of (non-career) provisional prosecutors is regulated by the principle of need, according to which the (non-career) provisional prosecutor occupies a vacancy while the need for the service exists. Therefore, the permanence in office of (non-career) provisional prosecutors depends on the need for the service, among other matters. That said, according to the principle of transience, the termination of the function occurs when there is no need for the service or no budgetary viability." *Cf.* Statement made by Rita Arleny Figueroa Vásquez (evidence file, volume VI, affidavits, folios 1255 and 1258).

[83] Even though the State argued that the presumed victim, in his capacity as a provisional prosecutor and, in general, provisional prosecutors in Peru "are not removed on a discretionary basis," the Court cannot help but conclude otherwise based on the evidence provided, the proven facts, and the arguments submitted, especially when the State itself asserted in its answering brief that "the resolution terminating a posting is a faculty of the employer – the Public Prosecution Service headed by the Prosecutor General – to conclude the designation if he/she considers this pertinent." In addition, in the answering brief the State argued that "when the need for the service ends, automatically and pursuant to the discretionary powers of the Prosecutor General, the designation of a non-career provisional prosecutor is terminated."

[84] *Cf. Case of Martínez Esquivia v. Colombia*, *supra*, para. 110.

[85] *Cf. Mutatis mutandis, Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, *supra*, para. 44; *Case of Reverón Trujillo v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of June 30, 2009. Series C No. 197, para. 78; *Case of Chocrón Chocrón v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2011. Series C No. 227, para. 99; *Case of the Supreme Court of Justice*

96. Regarding the alleged violations of the right of defense, the presumption of innocence and the principle of legality, the Court reiterates that it cannot be concluded that the procedure followed by the administrative authority was of a disciplinary or punitive nature. Even though both resolutions included a general reference to the existence of complaints and charges filed against the presumed victim, this mention was made with the purpose or interest that the disciplinary or judicial proceedings, as applicable, would be processed and concluded notwithstanding the decision to remove the presumed victim from his function as a provisional prosecutor.[86] Consequently, the Court considers that there is insufficient evidence to make the requested analysis of the said rights.

B.3.3. Right to remain in the post under general conditions of equality

97. Article 23(1)(c) of the Convention establishes the right to have access to public service under general conditions of equality. The Court has interpreted that access in equal conditions would constitute an insufficient guarantee if it were not accompanied by the effective protection of permanence in the position accessed.[87]

98. In cases of the arbitrary removal of judges, this Court has considered that this right is related to the judge's guarantee of tenure or irremovability,[88] which, based on the grounds described previously (*supra* paras. 78 and 79), is also applicable in the case of prosecutors. Respect and guarantee of this right are met when the criteria and procedures for appointment, promotion, suspension and dismissal are objective and reasonable and the individual does not suffer discrimination in the exercise of this right.[89] In this regard, the Court has indicated that equal opportunities in access to positions and stability in the position ensure freedom from any political pressures or interference.[90]

99. Based on the above, the Court considers that the decision terminating the presumed victim's appointment was arbitrary, because it was not based on any of the reasons permitted in order to ensure his independence in the post of provisional prosecutor. Consequently, this arbitrary removal unduly affected Julio Casa Nina's right to remain in the post under general conditions of equality, in violation of Article 23(1)(c) of the American Convention.

B.3.4. Failure to adapt domestic law in relation to the guarantee of tenure for prosecutors

100. The Court recalls that Article 2 of the Convention obliges the States Parties to adopt,

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(Quintana Coello et al.) v. Ecuador. Preliminary objection, merits, reparations and costs. Judgment of August 23, 2013. Series C No. 266, para. 145; *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of August 28, 2013. Series C No. 268, para. 189; *Case of Valencia Hinojosa et al. v. Ecuador*, *supra*, paras. 105 and 110, and *Case of Rico v. Argentina*, *supra*, para. 55.

86 This is inferred, above all, from the content of the resolution that terminated the appointment, which indicated that this decision was "without prejudice to the legal actions that could be pertinent based on the complaint and charge that are being processed." *Cf.* Resolution of the Prosecutor General of January 21, 2003 (evidence file, volume I, annex 2 to the Merits Report, folio 6).

87 *Cf. Case of Reverón Trujillo v. Venezuela*, *supra*, para. 138, and *Case of Martínez Esquivia v. Colombia*, *supra*, para. 115.

88 *Cf. Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, *supra*, para. 43, and *Case of Colindres Schonenberg v. El Salvador. Merits, reparations and costs.* Judgment of February 4, 2019. Series C No. 373, para. 94.

89 *Cf. Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, *supra*, para. 206, and *Case of Martínez Esquivia v. Colombia*, *supra*, para. 116.

90 *Cf. Case of Reverón Trujillo v. Venezuela*, *supra*, para. 72, and *Case of Martínez Esquivia v. Colombia*, *supra*, para. 116.

pursuant to their constitutional procedures and the provisions of the Convention, all legislative or other measures necessary to make effective the rights and freedoms protected by the Convention. This obligation entails the adoption of two types of measures. On the one hand, the elimination of laws and practices of any nature that result in a violation of the guarantees established in the Convention[91] either because they fail to acknowledge those rights and freedoms or because they hinder their exercise.[92] On the other, the enactment of laws and the implementation of practices conducive to the effective observance of those guarantees.[93]

101. In this specific case, based on the resolutions issued by the administrative authority in charge of the Public Prosecution Service,[94] the evidence provided[95] and the arguments of the parties – especially those of the State[96] – the Court notes that the powers exercised by that authority to appoint the presumed victim as a provisional prosecutor without specifying any resolutive condition that would determine the termination of the appointment, and also to terminate the designation in a discretionary manner, were supported by the inexistence of a specific legal framework that guaranteed the stability of the official while he held the post. Moreover, the Court also notes the existence of a judicial interpretation, including the opinion of the Constitutional Court, consistent with the decisions of the administrative authority.[97]

102. Therefore, based on the foregoing, since it did not eliminate practices that resulted in a violation of the guarantees established in the Convention, and in view of the failure to issue norms conducive to the effective observance of such guarantees, the State failed to comply with the duty to adopt domestic legal provisions pursuant to Article 2 of the Convention, in relation to the guarantee of irremovability of prosecutors, recognized as one of the judicial guarantees established in Article 8(1) of the Convention.

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91 *Cf. Case of Castillo Petruzzi et al. v. Peru. Merits, reparations and costs.* Judgment of May 30, 1999. Series C No. 52, para. 207, and *Case of Martínez Esquivia v. Colombia*, *supra*, para. 118.

92 *Cf. Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago. Merits, reparations and costs.* Judgment of June 21, 2002. Series C No. 94, para. 113, and *Case of Martínez Esquivia v. Colombia*, *supra*, para. 118.

93 *Cf. Case of Castillo Petruzzi et al. v. Peru*, *supra*, para. 207, and *Case of Martínez Esquivia v. Colombia*, *supra*, para. 118.

94 The resolution of June 30, 1998, cited Laws Nos. 26623, 26695 and 26738 (*supra* footnote 28 and para. 44), without specifying the articles. The resolutions of April 8, 2002, and January 21, 2003, cited article 64 of Legislative Decree 052, Organic Law of the Public Prosecution Service (*supra* para. 43). Lastly, the resolution of February 14, 2003, cited articles 5 of Law 27362 (*supra* para. 46) and 64 of Legislative Decree 052, Organic Law of the Public Prosecution Service. *Cf.* Resolution of the Executive Committee of the Public Prosecution Service of June 30, 1998 (evidence file, volume I, annex 1 to the Merits Report, folio 4); Resolution of the Prosecutor General of April 8, 2002 (evidence file, volume IV, annex 16 to the answering brief, folio 953); Resolution of the Prosecutor General of January 21, 2003 (evidence file, volume I, annex 2 to the Merits Report, folio 6), and Resolution of the Prosecutor General of February 14, 2003 (evidence file, volume I, annex 4 to the Merits Report, folio 12).

95 Among other matters, the witness Rita Arleny Figueroa Vásquez stated that "in 1997, […] Law No. 26898 was issued […] empowering the Executive Committee of the Public Prosecution Service to designate provisional prosecutors; this law, together with Laws Nos. 26623, 26695 and 26738 formed the framework that regulated the designation of provisional prosecutors," and that, "by law, designations of provisional prosecutors are temporary in nature, as indicated by the legislators in article 5 of Law No. 27362 […] which derogated the homologation of tenured and provisional magistrates of the Judiciary and of the Public Prosecution Service." *Cf.* Statement made by Rita Arleny Figueroa Vásquez (evidence file, volume VI, affidavits, folios 1248 and 1259).

96 In its answering brief, the State indicated that, in the case of the presumed victim, "both the designation and the termination of the appointment occurred for reasons that were duly justified by the institution and in keeping with the attributes and powers recognized by law to the Public Prosecution Service, in light of the need to cover vacancies on a temporary basis. Consequently, the termination of the appointment, in this specific case, was due to the extinction of a need of service."

97 The State also indicated that "the domestic courts, both of the Judiciary and also the Constitutional Court, have ruled on the provisional nature of magistrates, and a single line of thought can be observed in such rulings in cases that relate to the said matter." And it added that "according to domestic case law, the Constitutional Court has been ruling on different analogous cases to the effect that 'a substitution or provisional designation, as such, constitutes a situation that does not give rise to any rights other than those inherent in the post that is provisionally occupied by the individual who has no tenure of any kind […].'"

B.3.5. Right to work

103. The presumed victim, in his pleadings and motions brief, referred expressly to the violation of the right to work. In this regard, the Court reiterates that the representatives or the presumed victims may invoke rights other than those indicated by the Commission, provided that their allegations are based on the factual framework established in the Merits Report.[98]

104. The Court notes that, in the instant case, the legal issue raised by the presumed victim relates to the scope of the right to work and, in particular, the right to job stability, understood as a right protected by Article 26 of the American Convention. The Court recalls that the right to work has been recognized and protected under Article 26 in different precedents.[99]

105. With regard to the specific labor rights protected by the said Article 26, the Court has indicated that this article indicates that these are the rights derived from the economic, social, educational, scientific and cultural standards contained in the OAS Charter.[100] Articles 45(b) and (c),[101] 46[102] and 34(g)[103] of the Charter establish standards relating to the right to work. Additionally, in its Advisory Opinion OC-10/89, the Court indicated that the Member States have understood that the American Declaration contains and defines the fundamental human rights referred to in the Charter.[104] Article XIV of the said Declaration establishes that "[e]very person has the right to work, under proper conditions, and to follow his vocation freely […]." In addition, Article 29(d) of the American Convention expressly establishes that "[n]o provision of this Convention shall be interpreted as: […] (d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have." Furthermore, the Court has already indicated[105] that both the

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98 *Cf. Case of the "Five Pensioners" v. Peru*, *supra*, para. 155, and *Case of López et al. v. Argentina*, *supra*, para. 196.

99 *Cf. Case of Lagos del Campo v. Peru*, *supra*, paras. 142 and 145. Similarly: *Case of the Discharged Employees of PetroPeru et al. v. Peru*, *supra,* paras. 142 and 143; *Case of San Miguel Sosa et al. v. Venezuela*, *supra*, para. 220; *Case of Spoltore v. Argentina*, *supra*, para. 84, and *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil.*, *supra*, para. 155.

100 *Cf. Case of Lagos del Campo v. Peru*, *supra*, para. 143, and *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil.*, *supra*, para. 155.

101 Article 45 of the OAS Charter. The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms: […] (b) Work is a right and a social duty, it gives dignity to the one who performs it, and it should be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working; (c) Employers and workers, both rural and urban, have the right to associate themselves freely for the defense and promotion of their interests, including the right to collective bargaining and the workers' right to strike, and recognition of the juridical personality of associations and the protection of their freedom and independence, all in accordance with applicable laws.

102 Article 46 of the OAS Charter. The Member States recognize that, in order to facilitate the process of Latin American regional integration, it is necessary to harmonize the social legislation of the developing countries, especially in the labor and social security fields, so that the rights of the workers shall be equally protected, and they agree to make the greatest efforts possible to achieve this goal..

103 Article 34.g of the OAS Charter. The Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development. To achieve them, they likewise agree to devote their utmost efforts to accomplishing the following basic goals: […] g) Fair wages, employment opportunities, and acceptable working conditions for all.

104 *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights,* Advisory Opinion OC-10/89, July 14, 1989. Series A No. 10, para. 43.

105 *Cf. Case of Lagos del Campo v. Peru*, *supra*, para. 145.

international *corpus iuris*[106] and the domestic *corpus iuris*[107] establish the said right. In the case of Peru, article 22 of the Constitution enshrines this right, indicating the following: "[w]ork is a duty and a right. It is the basis for social well-being and a means of self-realization."

106. As regards its content and for the effects of the instant case, it is worth pointing out that in its General Comment No. 18 on the right to work, the Committee on Economic, Social and Cultural Rights indicated that this right "should not be understood as an absolute and unconditional right to obtain employment," but that it also "implies the right not to be unfairly deprived of employment."[108]

107. The Court has indicated that job stability does not consist in an unrestricted permanence in the post; but rather that this right must be respected, among other measures, by granting due guarantees of protection to the worker so that, if he or she is dismissed this is justified. This means that the employer must provide satisfactory reasons to impose this sanction with the due guarantees and that the worker may appeal the decision before the domestic authorities, who must verify that the justification given is not arbitrary or unlawful.[109] The Court has also indicated, in the case of *San Miguel Sosa et al. v. Venezuela,* that the State fails to comply with its obligation to ensure the right to work, and consequently job stability, when it does not protect state officials from arbitrary dismissals.[110]

108. As this judgment has reiterated, since prosecutors perform the functions of agents of justice, they need to enjoy guarantees of job stability as a basic condition for their independence in order to perform their functions satisfactorily (*supra* para. 78). Moreover, in the case of provisional prosecutors, the protection of their independence and objectivity requires that they be granted a certain type of stability and permanence in office, because the temporary nature of their appointment is not equivalent to discretionary removal (*supra* para. 81). The Court understands that, due to the functions they perform, prosecutors have the right to job stability and, therefore, State should respect and ensure this right.

109. In the instant case, the Court has concluded that the decision that terminated the appointment of Mr. Casa Nina was arbitrary because it did not respond to any of the causes permitted to guarantee his independence in the office of provisional prosecutor (*supra* para. 91). This also constitutes a violation of the right to job stability, as part of the right to work that, as an employee of the Public Prosecution Service of the Peruvian State, he had a right to during the time that he exercised the function.

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106 For example: Article 6 of the International Covenant on Economic, Social and Cultural Rights, Article 23 of the Universal Declaration of Human Rights; Articles 7 and 8 of the Social Charter of the Americas; Articles 6 and 7 of the Additional Protocol to the American Convention in the Area of Economic, social and Cultural Rights; Article 11 of the Convention on the Elimination of All Forms of Discrimination against Women; Article 32(1) of the Convention on the Rights of the Child, and also Article 1 of the European Social Charter and Article 15 of the African Charter on Human and Peoples' Rights.

107 The constitutional provisions of the States Parties to the American Convention that refer in any way to the protection of the right to work include: Argentina (art. 14 bis), Bolivia (arts. 46 and 48), Brazil (art. 6), Colombia (art. 25), Costa Rica (art. 56), Chile (art. 19), Dominican Republic (art. 62), Ecuador (art. 33), El Salvador (arts. 37 and 38), Guatemala (art. 101), Haiti (art. 35), Honduras (arts. 127 and 129), Mexico (art. 123), Nicaragua (arts. 57 and 80), Panama (art. 64), Paraguay (art. 86), Peru (art. 22), Suriname (art. 4), Uruguay (art. 36) and Venezuela (art. 87).

108 UN. Committee on Economic, Social and Cultural Rights, General Comment No. 18: *The right to work*, UN Doc. E/C.12/GC/18, November 24, 2005, para 6.

109 *Cf. Case of Lagos del Campo v. Peru*, *supra*, para. 150, and *Case of San Miguel Sosa et al. v. Venezuela*, *supra*, para. 220.

110 *Cf. Case of San Miguel Sosa et al. v. Venezuela*, *supra*, para. 221.

110. Based on the above, the State is responsible for the violation of the right to work, recognized in Article 26 of the Convention.

B.3.6. Alleged violation of the protection of honor and dignity and to equality before the law

111. Regarding the alleged violation of the protection of honor and dignity, despite the power of the presumed victim to invoke rights other than those indicated by the Commission, the Court notes that he did not provide specific arguments in this regard, but merely mentioned the connectivity of such rights "with those invoked in this case," and this does not reveal the grounds for his allegation. Therefore, the Court has no basis on which to conduct the analysis sought, because it is unable to appreciate what had given rise to this violation.

112. With regard to equality before the law, notwithstanding the lack of grounds for the analysis, it should be pointed out that the application of the legal norms that determined the power of the administrative authority to terminate the presumed victim's appointment has already been examined (*supra* para. 101). In any case, the Court stresses that, in principle, those norms do not constitute a discriminatory treatment towards provisional prosecutors in relation to career prosecutors because, as indicated, the independence that should be guaranteed to both professional categories does not imply that they are equivalent (*supra* para. 82).

B.3.7. General conclusion

113. Finally, in view of the fact that it failed to respect the guarantees required to safeguard independence in the exercise of his functions and his job stability as a provisional prosecutor, the Peruvian State is responsible for the violation of Articles 8(1), 23(1)(c) and 26 of the American Convention, in relation to Articles 1(1) and 2 of this instrument, to the detriment of Julio Casa Nina.

VIII.2
RIGHT TO JUDICIAL PROTECTION IN RELATION TO THE OBLIGATIONS TO RESPECT AND TO ENSURE RIGHTS[111]

A. Arguments of the Commission and the parties

114. The ***Commission*** argued that the presumed victim had availed himself of both administrative and constitutional remedies. However, none of the remedies filed were effective to contest the decision terminating his appointment and to review the violations of due process and the principle of legality. Mr. Casa Nina's ***representative*** did not submit arguments in this regard.

115. The ***State*** indicated that the content of the resolution deciding the appeal for review filed by the presumed victim revealed that, at the administrative level, the rights to judicial guarantees and judicial protection had not been infringed. It added that the Commission had not specified which actions were contrary to the obligation of judicial protection in the case of the application for amparo filed by Mr. Casa Nina. Sufficient arguments were presented in the different instances to determine that the decision to terminate the designation was not due to a disciplinary sanction. Even though the final result of the amparo proceeding was unfavorable to the presumed victim's claims, this could not signify the violation of the right to judicial protection recognized in Article 25 of the Convention.

[111] Article 25 of the American Convention, in relation to Article 1(1) of this instrument.

B. Considerations of the Court

116. This Court has indicated that Article 25(1) of the Convention establishes the obligations of the States Parties to ensure to everyone subject to their jurisdiction a simple, prompt and effective remedy against acts that violate their fundamental rights.[112] On this basis, the Court has indicated that, pursuant to Article 25 of the Convention, two specific State obligations can be identified. The first, to enact and to ensure the due application of effective remedies before the competent authorities that protect everyone subject to their jurisdiction against acts that violate their fundamental rights or that involve the determination of their rights and obligations. The second, to ensure the means to execute the respective final judgments and decisions issued by those competent authorities so that they truly protect the rights declared or recognized.[113] The right established in Article 25 is closely related to the general obligation of Article 1(1) of the Convention by attributing functions of protection to the domestic law of the States Parties.[114] Consequently, the State is responsible not only for creating and enacting an effective remedy, but also for ensuring that this remedy is applied properly by its judicial authorities.[115]

117. Specifically with regard to the effectiveness of the remedy, the Court has established that the meaning of the protection indicated in this article is the real possibility of having access to a judicial remedy so that a competent authority, qualified to issue a binding decision, determines whether or not there has been a violation of any right that the petitioner claims that he has and that, if a violation is found, the remedy is useful to restore to the party concerned the enjoyment of his rights and to redress the violation.[116] This does not mean that the effectiveness of a remedy is assessed depending on whether it produces a result that is favorable to the petitioner.[117]

118. In the instant case, Mr. Casa Nina challenged the decision that terminated his appointment as a provisional prosecutor by filing an application for amparo. In his application, he requested the protection of the rights to work, to due process and "not to be removed from office" and, in addition to contesting the – in his opinion – unilateral and unjustified decision of the Prosecutor General, he reiterated that no disciplinary administrative procedure had been instituted against him.[118] In response, the First Civil Court of Huamanga, Ayacucho, declared the application unsubstantiated based on both the petitioner's "condition of provisional […] and not incumbent," and on the assertion that the decision that terminated the appointment did not respond to the nature of a "disciplinary measure of removal from office."[119]

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112 *Cf. Case of Mejía Idrovo v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of July 5, 2011, Series C No. 228, para. 95, and *Case of Martínez Esquivia v. Colombia*, *supra*, para. 130.

113 *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*, *supra*, para. 237, and *Case of Noguera et al. v. Paraguay. Merits, reparations and costs.* Judgment of March 9, 2020. Series C No. 401, para. 79.

114 *Cf. Case of Castillo Páez v. Peru. Merits.* Judgment of November 3, 1997. Series C No. 34, para. 83, and *Case of López et al. v. Argentina*, *supra*, para. 209.

115 *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*, *supra*, para. 237, and *Case of López et al. v. Argentina*, *supra*, para. 209.

116 *Cf. Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 American Convention on Human Rights),* Advisory Opinion OC-9/87, October 6, 1987. Series A No. 9, para. 24; *Case of Castañeda Gutman v. Mexico. Preliminary objections, merits, reparations and costs.* Judgment of August 6, 2008. Series C No. 184, para. 100, and *Case of López et al. v. Argentina*, *supra*, para. 210.

117 *Cf. Case of Velásquez Rodríguez v. Honduras. Merits*, *supra*, para. 67, and *Case of López et al. v. Argentina*, *supra*, para. 210.

118 *Cf.* Application for amparo of November 29, 2004 (evidence file, volume IV, annex 19 to the answering brief, folios 967 to 980).

119 *Cf.* Judgment delivered by the judge of the First Civil Court of Huamanga, Ayacucho, on April 19, 2005 (evidence file, volume I, annex 7 to the Merits Report, folios 25 to 27).

119. The victim then filed an appeal in which he reiterated the argument of the violation of the rights to work, due process and "not to be removed from office."[120] The Civil Chamber of the Superior Court of Justice of Ayacucho confirmed the appealed ruling on the grounds that the presumed victim sought to allege "rights that correspond[ed] to career prosecutors" when the appellant had occupied "an appointment of trust"; that is, "a temporary post."[121]

120. Mr. Casa Nina lodged an appeal before the Constitutional Court repeating his previous arguments, and adding that the Prosecutor General's decision lacked a statement of reasons and he had not been able "to be heard or to know the charges against him."[122] The First Chamber of the Constitutional Court ruled declaring the complaint unsubstantiated because the victim, in light of the provisional, interim or transitory nature of his appointment, could not claim "the protection of rights that do not correspond to the person who has not been appointed pursuant to the provisions of articles 150 and 154 of the Constitution."[123]

121. The foregoing reveals that the different jurisdictional organs that heard the actions and remedies filed by Mr. Casa Nina rejected the issues raised based on two specific reasons: (i) the provisional nature of the victim's appointment, which determined that he was unable to claim the protection of rights that only corresponded to career prosecutors, and (ii) the non-punitive nature of the decision issued, which made the guarantees argued by the victim inapplicable.

122. As has been asserted in this judgment, the provisional nature of the appointment of prosecutors does not equal their discretionary removal; to the contrary, the safeguard of the independence of such agents of justice requires, precisely, a certain stability and permanence in office, until the resolutive condition that ends the designation is verified (*supra* para. 81).

123. Therefore, in this specific case, the courts that heard the actions filed by the victim did not address his specific claim regarding his right to stability in office given his condition as a provisional prosecutor and, thus, they did not provide effective protection in response to the claim due to the violation caused.

124. Consequently, the judicial remedies filed by Mr. Casa Nina to protect his rights (*supra* paras. 118, 119 and 120) were ineffective, because the different judicial authorities reiterated the argument that, owing to the provisional nature of his appointment, he did not enjoy any type of stability, which is contrary to the guarantees that prosecutors should enjoy, even when their appointment is provisional.

125. Consequently, the Court considers that the State is responsible for the violation of Article 25(1) of the Convention, in relation to Article 1(1) of this instrument, to the detriment of Julio Casa Nina.

IX
REPARATIONS

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120 *Cf.* Judgment delivered by the Civil Chamber of the Superior Court of Justice of Ayacucho on July 11, 2005 (evidence file, volume I, annex 8 to the Merits Report, folios 29 and 30).

121 *Cf.* Judgment delivered by the Civil Chamber of the Superior Court of Justice of Ayacucho on July 11, 2005 (evidence file, volume I, annex 8 to the Merits Report, folios 29 and 30).

122 *Cf.* Judgment delivered by the First Chamber of the Constitutional Court on November 14, 2005 (evidence file, volume I, annex 9 to the Merits Report, folios 29 and 30).

123 *Cf.* Judgment delivered by the First Chamber of the Constitutional Court on November 14, 2005 (evidence file, volume I, annex 9 to the Merits Report, folios 29 and 30).

126. Based on the provisions of Article 63(1) of the American Convention, the Court has indicated that any violation of an international obligation that has caused harm entails the duty to make adequate reparation and that this provisions reflects a customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility.[124] The Court has considered the need to grant diverse measures of reparation in order to redress the harm integrally. Therefore, in addition to pecuniary compensation, measures of restitution, rehabilitation and satisfaction together with guarantees of non-repetition have special relevance for the harm caused.[125] In addition, this Court has established that the reparations must have a causal nexus with the facts of the case, the violations declared, the harm proved, and the measures requested to redress the respective harm.[126]

127. Consequently, the Court will now analyze the claims presented by the Commission and the victim as well as the arguments of the State.

A. Injured party

128. The Court considers that, pursuant to Article 63(1) of the Convention, the injured party is anyone who has been declared a victim of the violation of any right recognized in this international instrument. Therefore, the Court considers that Julio Casa Nina is the "injured party."

B. Measures of restitution

129. The ***Commission*** requested that the State "reinstate the victim in a similar position to the one he served in, with the same remuneration, social benefits and a comparable rank to the one he would be entitled to today had he not been removed. In the event that the victim should not wish to be reinstated or there are objective reasons preventing this, the State must pay the corresponding compensation, which is independent of the reparations relating to pecuniary and non-pecuniary damage."

130. Mr. Casa Nina requested that he be "reinstated as a [superior] or provincial or adjunct prosecutor magistrate with all the prerogatives that would correspond to [him] today, and the pension rights that correspond to [him] with recognition of all the rights, irrespective of the pecuniary compensation or sanction."

131. The ***State*** argued that the National Council of the Judiciary, now the National Board of Justice, was not empowered to reinstate Mr. Casa Nina because the Board "only has competence to appoint, ratify, dismiss and, eventually, to reinstate career magistrates; in other words, those who obtained a post following a public competitive selection process and entered the prosecutorial or judicial career," which was not the situation in the instant case. Similarly, neither can the Public Prosecution Service order the reinstatement of a non-career provisional prosecutor because it does not have a vacant post given the temporary nature of this designation. It added that the National Council of the Judiciary had appointed a career official to the post of Provincial Deputy Criminal Prosecutor for Huamanga, Judicial District of Ayacucho, on February 9, 2005, so that the post that the victim occupied at the time of the

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[124] *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs*. Judgment of July 21, 1989. Series C No. 7, para. 25, and *Case of Almeida v. Argentina. Merits, reparations and costs.* Judgment of November 17, 2020. Series C No. 416, para. 54.

[125] *Cf. Case of the Los Dos Erres Massacre v. Guatemala, Preliminary objection, merits, reparations and costs*. Judgment of November 24, 2009. Series C No. 211, para. 226, and *Case of Almeida v. Argentina*, *supra*, para. 55.

[126] *Cf. Case of Ticona Estrada et al. v. Bolivia. Merits, reparations and costs.* Judgment of November 27, 2008. Series C No. 191, para. 110, and *Case of Almeida v. Argentina*, *supra*, para. 56.

facts no longer exists. Furthermore, the State indicated that the Prosecutor General had decided to convert the First, Second and Third Provincial Criminal Prosecution Offices into the First Corporative Provincial Prosecution Office of Huamanga, so that the entity in which the victim was employed no longer exists, and this made his reinstatement impossible. It added that providing compensation to the victim was not admissible either because the Public Prosecution Service, when ordering the termination of the temporal designation, acted within its legal powers and attributes, so that "it ha[d] not harmed the person of Julio Casa Nina."

132. With regard to the State's arguments, the Court notes that, by a resolution of the National Council of the Judiciary of February 9, 2005, an official was appointed to assume, as the incumbent, the post occupied by Mr. Casa Nina at the time his designation ended.[127] This situation reveals that, in this specific case, it is not viable to order the victim's reinstatement as requested. Accordingly, in light of the violations declared in this judgment, the State must pay Julio Casa Nina compensation, which this Court establishes, in equity, as US$30,000.00 (thirty thousand United States dollars).

C. Measures of satisfaction

133. Even though the parties and the Commission did not submit any specific requests with regard to measures of satisfaction, the Court, as it has in other cases,[128] establishes that the State must publish, within six months of notification of this judgment, in a legible and appropriate font: (a) the official summary of this judgment prepared by the Court, once, in the Official Gazette, and (b) this judgment in its entirety, available for one year, on the official website of the Public Prosecution Service. The State must inform this Court immediately when it has made each of these publications, regardless of the one-year time frame for presenting its first report established in the tenth operative paragraph of this judgment.

D. Guarantees of non-repetition

134. The ***Commission*** requested that the Court order measures of non-repetition that included the necessary measures: (a) " to prevent similar events from taking place in the future; in particular, to ensure application of the rules of due process in the context of procedures for the dismissal or removal of prosecutors, regardless of whether or not they are provisional," and (b) "so that domestic law and relevant practice conform to clear criteria and ensure guarantees in the appointment, tenure and removal of prosecutors, pursuant to the criteria set forth in the [Merits] Report." Mr. Casa Nina's ***representative*** did not submit requests in this regard.

135. The ***State*** argued that it applied the rules of due process in the procedures for the dismissal and removal of prosecutors, while reiterating that this case was not related to a dismissal or removal, but rather to the termination of a designation based on the needs for the service. It indicated that, in 2019, the National Authority for the Control of the Public Prosecution Service was created by Law No. 30944, and its functions include supervision of the designation of non-career provisional prosecutors, which must be made through a public competitive selection procedure. It added that this authority was currently being set up and brought into operation so that, opportunely, it would provide updated information on this matter.

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127 *Cf.* Resolution of the National Council of the Judiciary of February 9, 2005 (evidence file, volume IV, annex 24 to the answering brief, folio 997).

128 *Cf. Case of Cantoral Benavides v. Peru. Reparations and costs.* Judgment of December 3, 2001. Series C No. 88, para. 79, and *Case of Almeida v. Argentina*, *supra*, para. 65.

136. The Court, based on the arguments and evidence provided by the State, notes that, currently, the norms that regulate the appointment to office, tenure and termination of the functions of provisional prosecutors is contained in the "Internal regulations for the appointment, evaluation and tenure of provisional prosecutors," adopted by Resolution of the Prosecutor General No. 4330-2014-MP-FN of October 15, 2014. These regulations continue to condition the appointment of provisional prosecutors and also their termination to the concept of the "needs for the service," among other aspects, without establishing the guarantee of stability of these officials, because it does not circumscribe their removal from office to the established causes in order to safeguard their independence (*supra* para. 83). Indeed, article 15 of the said regulations establishes:

> The permanence of the provisional prosecutors depends on:
>
> 15.1. Probity and aptitude in performance.
> 15.2. The need for the service.
> 15.3. Availability of a budget.
> 15.4. Conversion, relocation, modification or reform of the office of the prosecutors.[129]

137. It should also be indicated that the reigning criteria, held by both administrative[130] and jurisdictional authorities[131] concerning the tenure of provisional prosecutors continues to be based on the power of the appointing authority to decide discretionally, in each case, on the pertinence of terminating the appointment, thereby disregarding the guarantee of stability of those officials.

138. Consequently, the Court determines that the Peruvian State, within a reasonable time, must adapt its domestic laws as outlined in paragraphs 81 and 83 of this judgment.

139. Nevertheless, the Court reiterates that the different State authorities, including judges and organs involved in the administration of justice, are obliged to exercise *ex officio* a control of conventionality between domestic law and the American Convention, evidently within their respective terms of reference and the corresponding procedural regulations. In this task, the domestic authorities should take into account not only the treaty but also how it has been interpreted by the Inter-American Court, the ultimate interpreter of the American Convention.[132] Therefore, regardless of the legal reforms that the State must adopt, it is essential that the authorities with competence to decide on the appointment and removal of prosecutors, and also the courts of justice, adapt their interpretation of the law to the principles established in this judgment.

E. Compensation

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[129] *Cf.* Resolution of the Prosecutor General No. 4330-2014-MP-FN of October 15, 2014 (evidence file, volume IV, annex 42 to the answering brief, folios 1151 to 1157).

[130] *Cf.* The witness Rita Arleny Figueroa Vásquez stated that the entry of a "non-career provisional prosecutor" into the institution was conditional "on the presence of a vacancy, the existence of the 'need for the service' […] and, to the extent that the individual had shown probity and aptitude in the performance of the function. The termination comes into effect when there is no longer a 'need for the service' or the institutional budget." *Cf.* Statement made by Rita Arleny Figueroa Vásquez (evidence file, volume VI, affidavits, folios 1243, 1244 and 1255).

[131] See, judgment of the Constitutional Court of September 29, 2015, file No. 1274-2013-AA/TC and judgment of the Constitutional Court of May 9, 2017, file No. 00646-2015-PA/TC (evidence file, volume IV, annex 39 to the answering brief, folios 1067 to 1070, 1098 and 1099); also, judgment of the Fifth Chamber for Administrative, Labor and Social Security Affairs of the Superior Court of Justice of Lima of January 19, 2017, file No. 14501-2013 (evidence file, volume IV, annex 40 to the answering brief, folios 1112 to 1118).

[132] *Cf. Case of Almonacid Arellano et al. v. Chile. Preliminary objections, merits, reparations and costs.* Judgment of September 26, 2006. Series C No. 154, para. 124, and *Case of Fernández Prieto and Tumbeiro v. Argentina. Merits and reparations.* Judgment of September 1, 2020. Series C No. 411, para. 100.

E.1. Pecuniary damage

140. The ***Commission*** asked that the State make full reparation for the consequences of the violations declared in the Merits Report, which should include the pecuniary damage.

141. Mr. Casa Nina requested the following for loss of earnings: "[…] as financial compensation […] for failing to receive [remuneration] as a magistrate for 17 years or, in months, exactly 201 months and 3 days, a sum totaling […] 818,491.75 soles. This is calculated based on the former monthly remuneration from 2003 to 2017, and the remuneration in force in 2018 and 2019."

142. The ***State*** argued that Mr. Casa Nina's request was erroneous for the following reasons: (a) the case file does not contain a claim for compensation due to arbitrary dismissal, which shows that the domestic authorities were not given the opportunity to rule on and resolve the claims that it is now sought to incorporate at the international level; (b) there is an error in the compensation period used as a basis for the calculation, because a single posting was considered, whereas there were two different designations, and the conclusion of the first one was not contested, so that it could not be the object of compensation; (c) it would not be correct to apply the maximum of 12 salaries, as can be seen was used to calculate the compensation; rather the equivalent to the period of service that was effectively worked; (d) there is an error in the calculation period used because the final date could not be the current one, but rather February 9, 2005, the day on which the career official was appointed to the post; (e) under the laws of Peru, there can be no remuneration for work that is not performed, as decided by the case law of the Constitutional Court and the Supreme Court of Justice; also, there is no norm that recognizes, for the concept of compensation, remuneration for work that has not been performed and, also, the concepts of civil liability, which would involve two types of compensation for a single fact, and (f) based on the foregoing, according to the expert report prepared by the accountant of the Council for the Legal Defense of the State, the correct amount would be 23,931.21 soles.

143. In its case law, the Court has developed the concept that pecuniary damage supposes the loss of or detriment to the income of the victims, the expenses incurred as a result of the facts, and the consequences of a pecuniary nature that have a causal nexus with the facts of the case.[133]

144. Regarding the compensation for pecuniary damage, under the concept of loss of earnings, the Court recalls that a resolution of February 9, 2005, appointed the official who would permanently assume the function exercised by the victim at the time of his removal.[134] Consequently, the corresponding calculation must be adjusted to this circumstance. Therefore, based on the period over which compensation should be paid for loss of earnings (from January 21, 2003, to February 9, 2005), and based on the amounts corresponding to the remuneration of officials with equivalent functions to that exercised by the victim at the time of the facts, the same figure appearing in the evidence provided by both parties,[135] the Court orders the payment of the sum of US$25,000.00 (twenty-five thousand United States dollars) for loss of earnings in favor of Julio Casa Nina.

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133 *Cf. Case of Bámaca Velásquez v. Guatemala. Reparations and costs*. Judgment of February 22, 2002. Series C No. 91, para. 43, and *Case of Almeida v. Argentina*, *supra*, para. 75.

134 *Cf.* Resolution of the National Council of the Judiciary of February 9, 2005 (evidence file, volume IV, annex 24 to the answering brief, folio 997).

135 *Cf.* Expert report signed by Vladimir Díaz Pillaca on October 31, 2019 (evidence file, volume III, annex 2 to the pleadings and motions brief, folios 762 to 797), and Expert report signed by Jesús Jackeline León Ybáñez on January 6, 2020 (evidence file, volume IV, annex 44 to the answering brief, folios 1173 to 1182).

E.2. Non-pecuniary damage

145. The ***Commission*** requested that the State "provide full reparation for the human rights violations […], including [… the] non-pecuniary aspect."

146. Mr. Casa Nina indicated that the State's actions had caused severe physical, mental and emotional harm to both himself and his family and had had a dramatic impact on his life project, especially for his children as their lifestyle had changed because, due to the family's financial situation, they were transferred from a private college to a State college. Therefore, he requested: "For the victim the sum of US$150,000 [United States] dollars. For [his] spouse the sum of US$50,000 [United States] dollars. For [his] children the sum of US$100,000 [United States] dollars (US$50,000 each). These amounts total US$300,000 [United States] dollars."

147. He also indicated that violations of rights that could be attributed to the State had caused harm to his life project in the personal, employment, social, professional, family and financial spheres and therefore requested the sum of US$100,000 (one hundred thousand United States dollars).

148. The ***State*** argued that the victim had not specified what the alleged impact consisted of. He had also alluded to physical harm without specifying this or providing details, and had used generic phrases such as the "gravity of the facts" and "intensity of the ailments caused," without explaining specifically what he was referring to. It added that the only victim is Julio Casa Nina, so that his wife and children do not form part of the dispute.

149. The State indicated that, to substantiate the non-pecuniary damage, the victim had presented a psychologist's report that was based on an erroneous premise, by considering that he had suffered an arbitrary dismissal or was removed, which constituted the central issue to identify the alleged suffering, added to which the report included aspects relating to persons other than the victim. The State added that the content of the report suggested that the supposed problems were amply overcome because "currently, his family businesses are well on the right track and his work as a legal consultant is successful." Consequently, it concluded that the alleged problems were not adequately substantiated.

150. With regard to the harm to the life project, the State indicated that the elements that the Court has used in its case law to determine this and to grant measures of reparation are not constituted in the case of Mr. Casa Nina. To the contrary, the arguments submitted lack substance to validly argue that the facts harmed his life project and, therefore, truly changed the course of his life. In any case, the victim had the opportunity to apply for a post in the Public Prosecution Service in order to have access to the career of prosecutor and did not do so, a situation that cannot be attributed to the State or considered to have an effect on the life project.

151. In its case law, this Court has developed the concept of non-pecuniary damage and has established that this may include both the suffering and afflictions caused to the direct victim and his close family, and also the impairment of values of great significance to the individual, as well as changes of a non-pecuniary nature, in the living conditions of the victims or their families.[136]

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[136] *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and costs.* Judgment of May 26, 2001. Series C No. 77, para. 84, and *Case of Almeida v. Argentina*, *supra*, para. 80.

152. The Court notes that, to prove the non-pecuniary damage, the victim provided a psychological report issued based on an interview and evaluation carried out by a psychologist, as well as his own statement. Regarding the former, although it refers expressly to what Mr. Casa Nina has stated as regards that, currently, his work as a lawyer "has greatly improved" and the family businesses are "financially profitable," the psychologist who signed the report indicated, as part of his conclusions, that during the judicial proceedings filed to protest his removal from office as provisional prosecutor, the victim revealed "a situational anxiety reaction and emotional turmoil, indicating a slight depression, anguish, anxiety, frustration."[137] For his part, in his affidavit, the victim indicated the following, *inter alia*: "[…] the way in which [he] was dismissed, removed, ousted, whatever you want to call it, from a decent stable and permanent job, protected and established in the Constitution of the Peruvian State, as a Provisional Deputy Provincial Prosecutor of Peru, and the arbitrary conduct by the Peruvian State[,] has been extremely detrimental […] to the undersigned deponent […]."[138]

153. Based on the above and on the circumstances of the case, the Court finds that the decision to remove Mr. Casa Nina from his post caused him non-pecuniary harm and, therefore, establishes, in equity, the sum of US$15,000.00 (fifteen thousand United States dollars) for the concept of non-pecuniary damage.

154. With regard to the allegation of harm to the life project, the Court recalls that, in its case law, it has established that harm to the life project is distinct from loss of earnings and consequential damage.[139] Harm to the life project relates to the complete realization of the person concerned based on their vocation, aptitudes, circumstances, potential and aspirations that allow them to establish certain reasonable expectations and achieve them.[140] Therefore, the life project is expressed by the expectations of the personal, professional and family development that is possible under normal conditions.[141] This Court has indicated that harm to the life project entails the loss or severe impairment of opportunities for personal development that are irreparable or very difficult to redress.[142] In specific cases, among other measures the Court has also ordered compensation for this type of harm.[143] In the instant case, the allegation of harm to Mr. Casa Nina's life project refers to an interruption of his professional development, but it has not been proved that his life project was affected irreparably or that it was very difficult to restore it. Therefore, the Court considers that there is insufficient evidence in this case to allow it to order this type of compensation.

155. Finally, the Court recalls that the only victim who has been declared an injured party is Julio Casa Nina, without the rest of his family being considered victims in this case (*supra* para. 31). Consequently, the Court will not examine the requests for compensation for the members of his family.

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137 *Cf.* Psychological assessment signed by Harvis Andrana Cordero Loayza (evidence file, volume III, annex 1 to the pleadings and motions brief, folios 749 to 760).

138 *Cf.* Statement made by Julio Casa Nina (evidence file, volume VI, affidavits, folio 1280).

139 *Cf. Case of Loayza Tamayo v. Peru. Reparations and costs.* Judgment of November 27, 1998, Series C, No. 42, para. 147, and *Case of Álvarez Ramos v. Venezuela*, *supra*, para. 225.

140 *Cf. Case of Loayza Tamayo v. Peru*, *supra*, para. 147, and *Case of Álvarez Ramos v. Venezuela*, *supra*, para. 225.

141 *Cf. Case of Tibi v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 7, 2004, Series C, No. 114, para. 245, and *Case of Álvarez Ramos v. Venezuela*, *supra*, para. 225.

142 *Cf. Case of Loayza Tamayo v. Peru*, *supra*, para. 150, and *Case of Álvarez Ramos v. Venezuela*, *supra*, para. 225.

143 *Cf. Case of the Las Dos Erres Massacre v. Guatemala*, *supra*, para. 293, and *Case of Rosadio Villavicencio v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of October 14, 2019. Series C No. 388, para. 249.

F. Costs and expenses

156. In his pleadings and motions brief, Mr. Casa Nina asked that the Court "order the State […] to reimburse the costs and expenses incurred […] in both the procedure before the Inter-American Commission, and the proceedings […] before the Inter-American Court." The ***State*** did not present arguments in this regard.

157. The Court reiterates that costs and expenses form part of the concept of reparation because the actions taken by the victims in order to obtain justice, at both the national and the international level, entail disbursements that should be compensated when the international responsibility of the State has been declared in a judgment convicting it. Regarding the reimbursement of costs and expenses, it is for the Court to make a prudent assessment of their scope, which includes the expenses arising before the authorities of the domestic jurisdiction, as well as those incurred during the proceedings before the inter-American system, taking into account the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment made be made based on the principle of equity and taking into account the expenses indicated by the parties, provided their *quantum* is reasonable.[144]

158. In the instant case, the file contains no evidentiary support for the costs and expenses that Mr. Casa Nina incurred during the processing of the case before the inter-American system and the victim did not base his request on any specific amount. However, the Court considers that such procedures necessarily entail pecuniary disbursements and, therefore, determines that the State must deliver to Julio Casa Nina the sum of US$15,000.00 (fifteen thousand United States dollars) for the concept of costs and expenses. It should be added that, at the stage of monitoring compliance with this judgment, the Court may establish that the State reimburse the victim or his representative for any reasonable expenses they incur at that procedural stage.[145]

G. Reimbursement of expenses to the Victim's Legal Assistance Fund

159. In the instant case, in an order of August 3, 2020, the President of the Court admitted the request presented by Julio Casa Nina to access the Victim's Legal Assistance Fund of the Court. In the order, the President stipulated that the necessary financial assistance be provided to cover the reasonable costs of the preparation and mailing of Mr. Casa Nina's affidavit.

160. On October 28, 2020, as established in Article 5 of the Court's Rules for the Operation of the said Fund, a note was sent to the State with information on the disbursements and a voucher for expenses amounting to S/2,500 (two thousand five hundred soles of the Republic of Peru). The State argued that, based on the voucher presented by the representative, the cost of preparing Mr. Casa Nina's affidavit was "extremely high," even "three times its real value, and was not justified by the service provided."

161. In this regard, the Court recalls that a communication of the Court's Secretariat of September 16, 2020, advised that the admissibility of the said statement would be decided at the proper procedural moment because it was forwarded eight days after the time frame had expired. As indicated in this judgment, the Court decided to admit the affidavit made by Julio

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144 *Cf. Case of Garrido and Baigorria v. Argentina*, *supra*, para. 82, and *Case of Almeida v. Argentina*, *supra*, para. 85.

145 *Cf. Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia. Merits, reparations and costs.* Judgment of September 1, 2010. Series C No. 217, para. 29, and *Case of Almeida v. Argentina*, *supra*, para. 86.

Casa Nina (*supra* para. 40). Regarding the State's observations, the Court points out that the cost for the preparation of the victim's affidavit corresponds to the lowest of the respective quotations advised by the representative. Moreover, the Court does not have the necessary elements to determine that, as the State claims, this cost could be disproportionate for the service provided.

162. Consequently, the Court orders the State to reimburse the said Fund the sum disbursed for the preparation and mailing of Mr. Casa Nina's affidavit which amounts to US$704.46 (seven hundred and four United States dollars and forty-six cents).[146] This amount must be reimbursed within six months of notification of this judgment.

H. Method of compliance with the payments ordered

163. The State shall make the payment of the compensation indicated in paragraph 132, as well as that ordered in this judgment for pecuniary and non-pecuniary damage and to reimburse costs and expenses directly to Julio Casa Nina, within one year of notification of this judgment.

164. If the beneficiary should die before the respective compensation is delivered to him, this must be delivered directly to his heirs, pursuant to the applicable domestic law.

165. The State shall comply with its pecuniary obligations by payment in United States dollars or the equivalent in national currency, using the exchange rate in force on the New York Stock Exchange (United States of America) the day before the payment to make the respective calculation.

166. If, for causes that can be attributed to the beneficiary of the compensation or his heirs, it were not possible to pay the amounts determined within the time frame indicated, the State shall deposit these amounts in their favor in a deposit account or certificate in a solvent Peruvian financial institution, in United States dollars, and in the most favorable financial conditions permitted by banking law and practice. If the corresponding compensation is not claimed within ten years, the amounts shall be returned to the State with the interest accrued.

167. The amounts allocated in this judgment as a measure of restitution, compensation for pecuniary and non-pecuniary damage, and to reimburse costs and expenses must be delivered to the person indicated integrally as established in this judgment, without any deductions arising from eventual taxes or charges.

168. If the State should fall in arrears, including in the reimbursement of expenses to the Victim's Legal Assistance Fund, it shall pay interest on the amount owed corresponding to banking interest on areas in the Republic of Peru.

X
OPERATIVE PARAGRAPHS

169. Therefore,

THE COURT

[146] The final amount is the result of applying to the sum indicated in the expense voucher attached to the note sent to the State on October 28, 2020, the exchange rate corresponding to the date the invoice was issued; this was S/3.5488 for US$1,00, according to information provided by the Banco Central de Reserva del Peru. Available at: https://www.bcrp.gob.pe/estadisticas/reportes-de-operaciones-monetarias-y-cambiarias.html.

DECIDES,

Unanimously:

1. To reject the preliminary objection relating to the fourth instance, pursuant to paragraphs 20 and 21 of this judgment.

By six votes to one:

2. To reject the preliminary objection regarding the Court's lack of jurisdiction to examine arguments concerning the right to work, pursuant to paragraphs 26 and 27 of this judgment.

Dissenting Judge Eduardo Vio Grossi.

DECLARES,

By six votes to one that:

3. The State is responsible for the violation of judicial guarantees, the right to remain in the post under general conditions of equality and the right to work recognized in Articles 8(1), 23(1)(c) and 26 of the American Convention on Human Rights, in relation to Articles 1(1) and 2 of this instrument, to the detriment of Julio Casa Nina, pursuant to paragraphs 84 to 110 and 113 of this judgment.

Dissenting Judge Eduardo Vio Grossi and partially dissenting Judge Humberto Antonio Sierra Porto.

By six votes to one that:

4. The State is responsible for the violation of the right to judicial protection guaranteed in Article 25(1) of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of Julio Casa Nina, pursuant to paragraphs 116 to 125 of this judgment.

Dissenting Judge Eduardo Vio Grossi.

AND ESTABLISHES:

By six votes to one that:

5. This judgment constitutes, *per se*, a form of reparation.

Dissenting Judge Eduardo Vio Grossi.

By six votes to one that:

6. The State shall make the publications indicated in paragraph 133 of this judgment.

Dissenting Judge Eduardo Vio Grossi.

By six votes to one that:

7. The State shall adapt its domestic laws in order to ensure job stability to provisional prosecutors, pursuant to paragraphs 136 to 139 of this judgment.

Dissenting Judge Eduardo Vio Grossi.

By six votes to one that:

8. The State shall pay the amounts established in paragraphs 132, 144, 153 and 158 of this judgment as compensation due to the unfeasibility of reinstating the victim in the post that he occupied, as well as compensation for pecuniary and non-pecuniary damage, and to reimburse costs and expenses, pursuant to paragraphs 163 to 168 of this judgment.

Dissenting Judge Eduardo Vio Grossi.

By six votes to one that:

9. The State shall reimburse the Victim's Legal Assistance Fund of the Inter-American Court of Human Rights the amount disbursed during the processing of this case, pursuant to paragraphs 162 and 168 of this judgment.

Dissenting Judge Eduardo Vio Grossi.

By six votes to one that:

10. The State, within one year of notification of this judgment, shall provide the Court with a report on the measures adopted to comply with it, without prejudice to the provisions of paragraph 133 of this judgment.

Dissenting Judge Eduardo Vio Grossi.

Unanimously that:

11. The Court will monitor full compliance with this judgment, in exercise of its authority and in fulfillment of its obligations under the American Convention on Human Rights, and will consider this case closed when the State has complied fully with its provisions.

Judge Ricardo Pérez Manrique informed the Court of his concurring opinion. Judge Humberto Antonio Sierra Porto informed the Court of his partially dissenting opinion. Judge Eduardo Vio Grossi informed the Court of his dissenting opinion.

DONE, at San José, Costa Rica, on November 24, 2020, in the Spanish language.

IACtHR. *Case of Casa Nina v. Peru.* Judgment on preliminary objections, merits, reparations and costs. Judgment of November 24, 2020. Judgment adopted virtually in San José, Costa Rica.

Elizabeth Odio Benito
President

L. Patricio Pazmiño Freire

Eduardo Vio Grossi

Humberto Antonio Sierra Porto

Eduardo Ferrer Mac-Gregor Poisot

Eugenio Raúl Zaffaroni

Ricardo C. Pérez Manrique

Pablo Saavedra Alessandri
Secretary

So ordered,

Elizabeth Odio Benito
President

Pablo Saavedra Alessandri
Secretary

DISSENTING OPINION OF JUDGE EDUARDO VIO GROSSI
INTER-AMERICAN COURT OF HUMAN RIGHTS
CASE OF CASA NINA *V.* PERU
JUDGMENT OF NOVEMBER 24, 2020
(*Preliminary objections, merits, reparations and costs*)

I. INTRODUCTION

1. This partially dissenting opinion[1] with regard to the judgment in reference[2] is issued to explain why I disagree with the second operative paragraph[3] in which, based on the provisions of Article 26 of the American Convention on Human Rights,[4] the preliminary objection on the lack of jurisdiction of the Inter-American Court of Human Rights[5] to examine violations of the right to work is rejected.

2. That said, owing to the relevance that this issue has in the Court's case law, I find it necessary to reiterate once again, although with the modifications imposed by the characteristics of this case, what I have set out in other separate opinions.[6]

II. PRELIMINARY OBSERVATIONS

3. But, first, it is necessary to mention the function of the separate opinion, the role of the Court, the rules for the interpretation of treaties and the instant case, to then refer to the

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[1] Art. 66(2) of the Convention: "If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment."

Art. 24(3) of the Statutes of the Court: "The decisions, judgments and opinions of the Court shall be delivered in public session, and the parties shall be given written notification thereof. In addition, the decisions, judgments and opinions shall be published, along with judges' individual votes and opinions and with such other data or background information that the Court may deem appropriate."
Art. 65(2) of the Court's Rules of Procedure: "Any Judge who has taken part in the consideration of a case is entitled to append a separate reasoned opinion to the judgment, concurring or dissenting. These opinions shall be submitted within a time limit to be fixed by the President so that the other Judges may take cognizance thereof before notice of the judgment is served. Said opinions shall only refer to the issues covered in the judgment."
Hereafter, each time that a provision is cited without indicating to which legal instrument it corresponds, it shall be understood that it is from the American Convention on Human Rights.

[2] Hereinafter, the judgment.

[3] "To reject the preliminary objection regarding the Court's lack of jurisdiction to examine arguments concerning the right to work, pursuant to paragraphs 26 and 27 of this judgment."

[4] Hereinafter, the Convention.

[5] Hereinafter, the Court.

[66] Partially dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of July 15, 2020; Partially dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights*, Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2019; Partially dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs,* Judgment of March 6, 2019*;* Partially dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, *Case of San Miguel Sosa et al. v. Venezuela, Merits, reparations and costs,* Judgment of February 8, 2018*;* Partially dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2017, and Separate Opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, *Case of the Discharged Employees of PetroPeru et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2017.

interpretation, sequentially, of Article 26, of the norms of the Charter of the Organization of American States[7] to which the said article alludes, and of the norms relating to the matter in hand in the Pact of San Salvador, all of which can help explain what I am seeking to substantiate in this text.

A. Function of the separate opinion

4. This separate opinion is presented both as an exercise of a right[8] - also recognized by other international courts[9] - and in compliance with an obligation to contribute to improving the understanding of the Court's decisions based on the competence, whether contentious,[10] or advisory and non-contentious,[11] that has been assigned to it and, consequently, to the development of international human rights law.

5. This dissent is also manifested with the hope that the Court will return to its position when it did not consider that the rights mentioned in Article 26 were justiciable. This hope rests on the fact that the Court's judgment is only binding for the State Party to the case in which it is delivered,[12] so that, for all the other States it is only a subsidiary source of

[7] Hereinafter, the OAS.

[8] *Supra*, footnote 1. Hereinafter each time a footnote refers to an article, "art." will be indicated, and it will be understood that it is an article of the American Convention on Human Rights, which, in turn, will hereafter be referred to as the Convention.

[9] Art. 74(2) of the Rules of Court of the European Court of Human Rights: « Any judge who has taken part in the consideration of the case by a Chamber or by the Grand Chamber shall be entitled to annex to the judgment either a separate opinion, concurring with or dissenting from that judgment, or a bare statement of dissent.*"*

Art. 44 of the Statute of the African Court of Human and Peoples' Rights: « if the judgment does not represent in whole or in part the unanimous opinion of the Judges, any Judge shall be entitled to deliver a separate or dissenting opinion.*"*

Art. 57 of the Statute of the International Court of Justice: "If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion."

Art. 74(5) of the Rome Statute of the International Criminal Court: "The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court."

Art. 30(3) of the Statute of the International Tribunal for the Law of the Sea: "If the judgment does not represent in whole or in part the unanimous opinion of the members of the Tribunal, any member shall be entitled to deliver a separate opinion."

[10] Art. 62(3): "The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement."

[11] Art. 64: "1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court.

2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments.*"*

[12] Art. 68: "1. The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties.

2. That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state."

international law; in other words, it does not create rights, it merely determines what has been established by an autonomous source.[13]

B. The Court's role

6. With regard to the Court, it should be recalled that its role is to impart justice in the area of human rights pursuant to the law and, more specifically, pursuant to the Convention. Consequently, it enjoys the broadest possible autonomy in its task, which means that it is essential that it is extremely rigorous in the exercise of it competences and, therefore, in its respect for the principles inherent in every jurisdictional body, such as impartiality, independence, objectivity, political neutrality, equanimity, full equality before the law and justice, non-discrimination and absence of prejudice, and all of this in order not to undermine the efforts it has been making for more than 40 years.

7. Moreover, based on the foregoing and also recalling that the objective sought by the Court in the exercise of its contentious jurisdiction should be the prompt and effective restoration by the State concerned of respect for the violated human rights,[14] it is essential that it proceed pursuant to the principle of "*pacta sunt servanda*";[15] in other words, require of the State what it really freely and sovereignly undertook to comply with.[16] Thus, the legal security that this rule signifies should not be understood as a limitation or restriction for the development of human rights, but rather as the instrument that can best ensure respect for them.

8. Likewise, it should be noted that, although disputes relate to the violation of rights of the individual and even though the latter may, based on the regulations, although not on the Convention, lodge briefs before the Court and be heard by it,[17] the corresponding proceedings

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[13] Art. 38 of the Statute of the International Court of Justice: "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

(b) international custom, as evidence of a general practice accepted as law;

(c) the general principles of law recognized by civilized nations;

(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo* if the parties agree thereto."

[14] Art. 63(1): "If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

[15] Art. 26 of the Vienna Convention on the Law of Treaties: *"Pacta sunt servanda."* Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Hereinafter, the Vienna Convention on the Law of Treaties will be identified as "the Vienna Convention".

[16] Art. 33: "The following organs shall have competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to this Convention:

a. the Inter-American Commission on Human Rights, referred to as "The Commission;" and

b. the Inter-American Court of Human Rights, referred to as "The Court."

[17] Art. 25(1) of the Court's Rules of Procedure: "Participation of the Alleged Victims or their Representatives. Once notice of the brief submitting a case before the Court has been served, in accordance with Article 39 of the Rules of Procedure, the alleged victims or their representatives may submit their brief containing pleadings, motions and evidence autonomously and shall continue to act autonomously throughout the proceedings."

And Arts. 39(1)(d) and (5), 40, 42(3), 43, 46(1), 50(5), 51(5), (7) and (9). 52(2), 53, 56, 62, 63, 66(2), 66(1) and (6), and 69(1) and (3), all of the Court's Rules of Procedure.

continue to be between States Parties to the Convention and, in the Court and before the defendant State, they are represented by the Inter-American Commission on Human Rights.[18] Consequently, this is the scenario in which the States have sovereignly consented to partially limit their sovereignty by recognizing the existence of human rights guaranteed by international law. However, it is also true that they have not abdicated their internal, domestic and exclusive competence to regulate those rights in their Constitutions under the heading of fundamental rights, and they have even reserved to themselves the primary responsibility for hearing and settling any disputes that arise with regard to them, especially based on the principle of the complementarity and collaboration of the international jurisdiction in relation to the domestic jurisdiction[19] and the establishment of the requirement of prior exhaustion of domestic remedies.[20]

9. Ultimately, cases do not involve merely a relationship between the State that has presumably violated human rights and the presumed victim, but concern inter-American public order; in other words, these are matters that affect the overall interests of international society and this is why the individual is recognized to be a subject of international law to some extent and, despite its limited scope, this has constituted one of the major advances or changes in international law during the second half of the twentieth century.

10. And perhaps it is a good thing that the individual's status of subject of international law is only partial because, otherwise, the relationship between the State that has presumably violated human rights and the presumed victim would be totally asymmetric, unbalanced, unequal, to the detriment of the latter, because he would not have the political weight or support that the other States can provide, either through the Commission[21] or because the corresponding judgment is complied with.[22]

11. That said, the Court must evidently deliver judgment pursuant to the law expressed, as regards the Court, in the Convention and, consequently, in international human rights law which the latter forms part of. This includes the respective procedural norms that, especially in the area of human rights, are as essential as the substantive norms because respect for them permits the latter to be truly effective. Thus, the form is indissolubly linked to the content. And, to a great extent, the procedural norms, at times considered mere formalities and, consequently susceptible to being disregarded in order to give preference to the substantive norms, condition the applicability of the latter. If this fact is not considered, it could have a devastating effect for the exercise of human rights.

12. Therefore, the Court must respect the principle of public law that it is only possible to do what the norm expressly authorizes; therefore, when something is not regulated, the

[18] Art. 35: " The Commission shall represent all the member countries of the Organization of American States." Art. 61(1): "Only the States Parties and the Commission shall have the right to submit a case to the Court." Hereinafter, the Commission.

[19] Preamble, para. 3.

[20] Art. 46: "1. Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements: (a) that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law;

[21] *Supra*, footnote 18.

[22] Art. 65: "To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations."

respective State's exclusive, internal or domestic jurisdiction applies,[23] a principle expressly established in the OAS Charter[24] and indirectly in the Convention.[25] In this regard, it should be recalled that the theory of implicit powers, which establishes the principle that the international organization concerned must be deemed to have those powers that are essential to the performance of its duties, even if they not provided for in the convention on which it is based[26] – which is expressed by the competence-competence principle[27] – is applied to the Court only when it is necessary for the exercise of its competence, expressly conferred by the Convention, to hear a case or to issue advisory opinions, and not with regard to the possible exercise of powers that are totally unnecessary for this purpose.

13. Therefore, on the one hand, the Court must proceed in keeping only with what the Convention effectively establishes and not with what it would like it to establish and, on the other hand, it must avoid modifying the Convention, which is a power explicitly assigned to its States Parties.[28] Consequently, if the Court does not agree with what the article of the Convention establishes, it should not try to exercise the international legislative function that is the responsibility of the States, but rather advise them of the need to amend the norm in question. Thus, the new provision that possibly results from the exercise of that function by the States will clearly enjoy a broader and more solid democratic legitimacy.

14. It is based on all the above that, strictly speaking, the Court is not responsible for promoting and defending human rights, which is the function that the Convention expressly assigned to the Commission,[29] which could be categorized as an activist, understanding this

[23] "The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain." Permanent Court of International Justice, Advisory Opinion on Nationality Decrees issued in Tunisia and Morocco (French zone), Series B No. 4, p.24.

Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, "Art.1: At the end of the preamble to the Convention, a new recital shall be added, which shall read as follows: "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention."

[24] Art. 1(2): "The Organization of American States has no powers other than those expressly conferred upon it by this Charter, none of whose provisions authorizes it to intervene in matters that are within the internal jurisdiction of the Member States."

[25] Art. 31: "Recognition of Other Rights. Other rights and freedoms recognized in accordance with the procedures established in Articles 76 and 77 may be included in the system of protection of this Convention.

Art. 76*(*1): Proposals to amend this Convention may be submitted to the General Assembly for the action it deems appropriate by any State Party directly, and by the Commission or the Court through the Secretary General.

Art. 77(1): "In accordance with Article 31, any State Party and the Commission may submit proposed protocols to this Convention for consideration by the States Parties at the General Assembly with a view to gradually including other rights and freedoms within its system of protection.

[26] "Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties." ICJ, "Reparation of Injuries Suffered in Service of the United Nations," pp. 9-12.

[27] *Cf.* Inter-American Court of Human Rights. *Case of Jenkins v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of November 26, 2019. Series C No. 397, para. 31.

[28] Supra, footnote 25.

[29] Art. 41: ""The main function of the Commission shall be to promote respect for and defense of human rights. In the exercise of its mandate, it shall have the following functions and powers:

(a) to develop an awareness of human rights among the peoples of America;

work in the most positive sense possible.[30] To the contrary, let me repeat, the Court is responsible – in the exercise of its contentious jurisdiction – for ruling, with binding effects for the defendant States, in the cases that are submitted to it and, in the exercise of its advisory and non-contentious competence, for issuing its non-binding opinion; in other words, in both situations, applying and interpreting the Convention. Evidently, to this end, it must not only respect the provisions of international human rights law, but also those of general international law and, ultimately, law in general, even in the eventuality that one, some or all of them establish norms that are not shared.

15. And this is necessary, not only to deliver a solid and substantiated judgment or advisory opinion, but also so that, in the case of the former, the State concerned restores as soon as possible the effective enjoyment of the violated human right or, in the case of the latter, proceeds after having been warned that, if it does so in a certain way, it runs the risk of committing a human right violation. In sum, abiding by law allows the Court to be as objective as possible in its decisions and, consequently, more just.

C. Interpretation of treaties

16. Therefore, the Court is responsible for determining, from among the various possibilities, the meaning and scope of the Convention's provisions. Evidently, if the text of the corresponding norm does not offer several alternatives for its application, it would not be necessary to examine it further, because it would not represent an obscure or ambiguous matter whose meaning and scope needed to be determined.

17. This means that the interpretation of the Convention consists in fathoming the intention of its States Parties when they signed it and, eventually, how that intention expressed in the Convention should be understood in relation to new situations. And, for this purpose, it is necessary to consider the Convention not only as an expression of the reality, but also of what it aspires to be. In other words, the Convention not only reflects the society that it regulates, but also the society that it hopes for.

18. That said, the principal rule for the interpretation of treaties contained in the Vienna Convention on the Law of Treaties,[31] is that:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

(b) to make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights;

(c) to prepare such studies or reports as it considers advisable in the performance of its duties; (d) to request the governments of the member states to supply it with information on the measures adopted by them in matters of human rights;

(e) to respond, through the General Secretariat of the Organization of American States, to inquiries made by the member states on matters related to human rights and, within the limits of its possibilities, to provide those states with the advisory services they request;

(f) to take action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51 of this Convention; and

(g) to submit an annual report to the General Assembly of the Organization of American States."

[30] Diccionario de la Lengua Española, Real Academia Española, 2020. *"Activismo: 1. Tendencia a comportarse de un modo extremadamente dinámico. 2. Ejercicio del proselitismo y acción social de carácter público. Activista: 1. Perteneciente o relativo al activismo. 2. Seguidor del activismo."*

[31] Hereinafter, the Vienna Convention.

19. This rule includes four means of interpretation.[32] One is the method based on good faith, which means that what was agreed by the States Parties to the treaty concerned should be understood based on what they effectively had the intention of agreeing to so that it is truly applied and has practical effects. In this regard, good faith is closely related to the "*pacta sunt servanda*" principle.[33] The second, is the textual or literal method, which refers to the analysis of the text of the treaty, the wording used, and the ordinary meaning of its terms. The third is the subjective method that seeks to establish the intention of the States Parties to the treaty by analyzing the *travaux préparatoires* and the subsequent conduct of the States Parties with regard to the treaty. And the forth is the functional or teleological method that seeks to determine the object and purpose of the treaty. Since these four means of interpretation are included in the same phrase, forming a single rule, they should be applied simultaneously and harmoniously, without preferring or downplaying one or the other. This is the main characteristic that distinguishes the interpretation of treaties from that of other norms.[34]

20. Regarding the special rule established in Article 29 of the Convention,[35] known as the *pro personae* principle, it should be recalled that this is a rule relating to the interpretation of the Convention, and mandating that, in that exercise, the meaning and scope that is understood cannot permit a limitation of the human right that the Convention ensures or that is recognized by the other legal instruments it indicates. Therefore, this article obliges the Court to interpret the rights ensure in the Convention with the broadest meaning and scope established in this instrument or in other applicable legal instruments.

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[32] Art. 31 of the Vienna Convention: "General rule of interpretation.

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

2. "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

c) any relevant rules of international law applicable in the relations between the parties."

4. A special meaning shall be given to a term if it is established that the parties so intended."

[33] *Supra*, footnote 15.

[34] As in the case of article 19 of the Civil Code of Chile: "When the meaning of the law is clear, its literal meaning should not be ignored, on the pretext of consulting its spirit. However, to interpret an obscure expression of the law, it is possible to have recourse to its intention or spirit, clearly apparent in it, or to the reliable history of its creation."

[35] "Restrictions Regarding Interpretation. No provision of this Convention shall be interpreted as:

(a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;

(b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;

(c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government, or

(d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

21. Furthermore, regarding case law as an instrument of interpretation, it should be recalled that the judgment delivered by the Court in a case that has been submitted to its consideration is binding only for the State Party or States Parties to the case.[36] For all the other States, it constitutes a supplementary means for determining the rules of law.[37] And, in the case of advisory opinions, these are not binding and cannot be binding because the States are not obliged to appear before the Court in the process for their elaboration, and it does not involve an adversarial procedure. Moreover, the Convention does not assign a binding nature to advisory opinions since the OAS organs and even the States can request them with regard to the compatibility of any of their laws with the Convention[38] and .[39]

22. Also, with regard to case law, it appears necessary to include some brief comments on the expressions used in several of the Court's judgments, such as that "human rights treaties are living instruments, the interpretation of which must evolve with the times and current circumstances."[40] The first comment is that this is established in Article 31(3)(a) and (b) of the Vienna Convention, when it indicates that, together with the context, there should be taken into account the agreements and the practice of the States regarding the interpretation of the treaty concerned. Thus, the evolutive aspect should refer more to the applicable law than to the case law issued concerning it.

23. The second comment is that, consequently, the said evolutive interpretation should relate specifically to the society regulated by international law and, in particular, by the Convention; in other words, the international society formed of sovereign States that are all equal, among which there is no pre-established hierarchy of power or of laws, or enforceability of submission to an international judicial instance, and where the legislative and executive functions correspond to the States. It is in that context in which, as legal doctrine indicates, the judicial function consisting in transforming the general and abstract mandates of the Convention into concrete and specific mandates should be inserted. To this end, the respective judicial instance should not delegate to others its authority to determine the said evolution and the current circumstances, because, if it did, this would lead to assertions unrelated to the justice that it should impart.

24. Moreover, when resorting to evolutive interpretation, the Court should take special care not to devalue what was agreed on literally, leaving it without any practical usefulness, and thus giving rise to legal uncertainty in the States Parties to the Convention and, above all, doubts and fears about adhering to the Convention in those that have not yet done so.

D. The instant case

[36] Supra, footnote 12.

[37] *Supra*, footnote 13.

[38] *Supra*, footnote 11.

[39] Separate opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, Advisory Opinion OC-24/17, of November 24, 2017, requested by the Republic of Costa Rica*, Gender Identity, and Equality and Non-Discrimination with regard to Same-Sex Couples. State Obligations in relation to Change of Name, Gender Identity, and Rights deriving from a relationship between Same-Sex Couples (Interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights),* paras. 8 to 16.

[40] *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of July 15, 2020. Series C No. 407, para. 158.
Hereafter, each time that "para." or "paras." Is indicated, it is understood that this refers to a "paragraph" or "paragraphs" of the judgment or document referred to.

25. In this regard, it should be recalled that the judgment indicates that the "Court reaffirms its competence to examine and decide disputes relating to Article 26 of the American Convention as an integral part of the rights listed in its text, regarding which Article 1(1) establishes obligations of respect and guarantee,"[41] adding that "as indicated in previous decisions,[42] the considerations related to the possible occurrence of such violations must be examined when analyzing the merits of the matter."[43]

26. Since the judgment provides no other reason that the one briefly expressed above as justification for this decision, it obliges me, in order to substantiate this dissenting opinion, to resort to the considerations concerning that substantive part where, as we shall see,[44] it provides arguments to support the said decision it has adopted.

27. However, to do this, it is necessary to recall that, when alluding to the said Article 26,[45] the judgment does so referring specifically to the right to work; in other words, it justifies the application of the article with regard to that right.[46] Thus, the purpose of this opinion is to present, once more, my position that the rights mentioned in Article 26, including the right to work, are not justiciable before the Court – for the reasons described below – with some exceptions that do not include the situation in the instant case.

28. It is extremely important, therefore, to indicate at once that this opinion does not refer to the existence of the right to work, or to the other economic, social and cultural rights. The existence of those rights is not the purpose of this opinion. To the contrary, what I maintain here, let me insist, is merely that the Court, contrary to what is indicated in the judgment, lacks competence to examine violations of those rights under the provisions of Article 26, and that the right referred to in the instant case is not included among the exceptions to this general rule.

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[41] Footnote to para. 26 of the judgment: *Cf. Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2009. Series C No. 198, paras. 16, 17 and 100*; Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 340, paras. 142 and 154; *Case of the Discharged Employees of PetroPeru et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2017. Series C No. 344, para. 192; *Case of San Miguel Sosa et al. v. Venezuela. Merits, reparations and costs.* Judgment of February 8, 2018. Series C No. 348, para. 220; *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349, para. 100; *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, paras. 75 to 97; *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375, paras. 34 to 37; *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 21, 2019. Series C No. 394, paras. 33 and 34; *Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2019. Series C No. 395, para. 62; *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, reparations and costs.* Judgment of February 6, 2020. Series C No. 400, para. 195; *Case of Spoltore v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of June 9, 2020. Series C No. 404, para. 85, and *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of July 15, 2020. Series C No. 407, para. 23.

[42] Footnote to para. 26: *Cf. Case of Muelle Flores v. Peru, supra*, para. 37, and *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil.. Preliminary objections, merits, reparations and costs.* Judgment of July 15, 2020. Series C No. 407, para. 23.

[43] Para. 26.

[44] *Infra*, paras. 55 and *ff.*

[45] Hereinafter, Article 26.

[46] Paras. 104 and 105.

29. However, this does not mean that violations of those rights cannot be litigated before the corresponding domestic jurisdictions. This will depend on what the respective internal laws establish, a matter that, in any case, falls outside the purpose of this text and that is part of the internal, domestic or exclusive jurisdiction of the States Parties to the Convention.[47] Nevertheless, it is feasible that, in the future, all or some of the States Parties to the Convention might agree on protocols that establish the justiciability before the Court of possible violations of other economic, social and cultural rights than those established in the Protocol of San Salvador.

30. Consequently, this opinion holds that it is necessary to distinguish between human rights in general, which must be respected in all circumstances based on the provisions of international law, and those that, in addition, may be justiciable before an international jurisdiction. In this regard, it is worth pointing out that there are only three international human rights courts; namely, the Inter-American Court of Human Rights, the European Court of Human Rights and the African Court of Human and Peoples' Rights. Also, not all the States of the respective regions have accepted the jurisdiction of the corresponding court. Also, not all the regions of the world have an international human rights jurisdiction, nor has a universal court of human rights been created.

31. Therefore, the fact that a State has not accepted to be subject to an international human rights jurisdiction does not mean that such rights do not exist and, consequently, cannot possibly be violated. If this happens, international society can use diplomatic or political measures to achieve the restoration of respect for the said rights, even though such measures may be too weak for this purpose. Thus, one thing is the international recognition of such rights, and another is the international instrument used to achieve the restoration of their effectiveness in situations in which they are violated.

III. INTERPRETATION OF ARTICLE 26

32. Therefore, based on the foregoing – in particular, as regards the interpretation of treaties[48] – Article 26 should be interpreted in keeping with the methods indicated above. This article establishes:

> "Progressive Development. The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means and subject to available resources, the full realization of the rights implicit in [Note: literally "derived from" in the Spanish original] the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires."

33. However, first a preliminary note. Although it is laudable that judgments cite or invoke previous judgments to support a similar line of reasoning, it is also true that the mere reference to them is not sufficient to substantiate this. If this were so, it would be sufficient, as appears to occur in the instant case,[49] to assert that, since the Court has already made a ruling in a certain sense, in this case it will make the same ruling. Moreover, by proceeding in this way, it should be recalled that the Court is confirming the premises that supported the precedents, so that it may be essential for anyone dissenting with the decision, as in the

[47] *Supra*, footnote 23.

[48] *Supra*, II, c.

[49] Paras. 26 and 104.

instant case, to refer to them, even though the corresponding judgment did not include any reference in this regard.

A. Good faith

34. According to the method based on good faith, it is more than evident that the practical effect of this rule is that the States Parties to the Convention should truly adopted measures, both in the domestic sphere and also in the area of international cooperation, to achieve progressively the full realization of the rights derived from the standards of the OAS Charter, and all of this subject to available resources. Thus the State obligation established in Article 26 is to adopt measures to make the said rights effective and not that they really are in effect. The obligation is one of conduct, not of results. This obligation could not be otherwise, when it depends on two factors: available resources and international cooperation, which are beyond the control of the State concerned.

35. In this regard, attention must be drawn to the fact that the provisions of Article 26 are similar to those of Article 2 of the Convention; namely, in the latter, the States are obliged to adopt measures where the exercise of any of the rights or freedoms referred to in Article 1 of the Convention are not already ensured[50] and, in the former, to adopt measures in order to achieve progressively the full realization of the rights that it mentions derived from the standards set forth in the OAS Charter. However, the two articles differ in that the latter conditions compliance with its provisions to international cooperation and the availability of the corresponding resources.

36. Based on the foregoing, it is necessary to reflect on the reason why Article 26 was adopted and, therefore, why the rights that it refers to were not addressed in the same way as the civil and political rights. Based on good faith, the answer can only be that the Convention considered that both types of human rights – although closely linked owing to the ideal to which they aspire, which is, according to its Preamble, to create the conditions that permit their "enjoyment"[51] – are, however, different and, in particular, have been developed differently in the sphere of public international law, so that they required a differentiated treatment, which is precisely what the Convention does as also indicated in its Preamble.[52]

37. Therefore, based on the principle of good faith, it is necessary to underline that although the Preamble to the Convention affirms that "everyone should enjoy his economic, social and cultural rights, as well as his civil and political rights," this does not mean – as the judgment asserts – that the practical effect of Article 26 is that the violations of the rights it mentions are justiciable before the Court, but merely that the States must adopt the pertinent measures, including through international cooperation, and subject to the available resources, to realize the said rights progressively.

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[50] Art. 2: "Domestic Legal Effects. Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.".

[51] Para. 4: "Reiterating that, in accordance with the Universal Declaration of Human Rights, the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights."

[52] Preambular para. 5: "Considering that the Third Special Inter-American Conference (Buenos Aires, 1967) approved the incorporation into the Charter of the Organization itself of broader standards with respect to economic, social, and educational rights and resolved that an inter-American convention on human rights should determine the structure, competence, and procedure of the organs responsible for these matters."

38. Additionally, it is essential to note that it is surprising that the judgment has not referred more extensively to good faith as an element that is as essential as the others established in Article 31(1) of the Vienna Convention for the interpretation of treaties. Likewise, it is also strange that it has not provided any explanation of the inclusion of Article 26 in a separate chapter from the political and civil rights and, in particular, what are its fundamental purpose and its practical effect. The judgment provides no answers with regard to the reason for the existence of Article 26 as a different article from those established for the civil and political rights.

39. In sum, good faith leads to considering Article 26 on its own merits, which means that it should be interpreted not as recognizing rights that it does not list or describe, as in the instant case, but rather as referring to norms other than those of the Convention for more complete information on such rights, such as those of the OAS Charter. Consequently, its special and practical effect is, let me repeat, that the States Parties to the Convention should adopt measures to achieve progressively the rights derived from those norms, and all of this subject to international cooperation and the available resources.

40. The judgment omits any reference to good faith and diverges markedly from what the Vienna Convention establishes in this regard in relation to the interpretation of treaties.

B. Literal meaning

41. When interpreting Article 26 in light of its literal or ordinary meaning, it can be concluded that this article:

i. is to be found, as the only article, in Chapter III, entitled "Economic, Social and Cultural Rights,"[53] of Part I, entitled "State Obligations and Rights Protected," which also includes Chapter I "General Obligations," and Chapter II "Civil and Political Rights"; consequently, it can be seen from this that it is the Convention itself that, contrary to what the Court has considered in its case law,[54] considers the civil and political rights separately from the economic, social and cultural rights, making a clear distinction between them, by providing a special and differentiated consideration to each of them;

ii. does not list or provide details or specify the rights to which it alludes; it merely identifies them as those derived[55] "from the economic, social, educational, scientific, and cultural standards set forth in the Charter of the" OAS; in other words, rights that can be understood or inferred from[56] the latter's provisions;

iii. *ergo*, it unambiguously does not recognize the rights referred to and does not ensure their exercise, as the Convention does [in the case of the civil and political rights];

iv. it does not make such rights effective or enforceable, because if it had wished to do so, it would have stated this directly and without any ambiguity; in other words, contrary to the Court's case law, there is no "reference with a sufficient degree of specificity to the

[53] Chapter IV of Part I is entitled "Suspension of Guarantees, Interpretation and Application" and Chapter V is entitled "Personal Responsibilities."

[54] *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 340, para. 141.

[55] "*Derivar: Dicho de una cosa: Traer su origen de otra."* Diccionario de la Lengua Española, Real Academia Española, 2020

[56] "*Inferir: Deducir algo o sacarlo como conclusión de otra cosa*", Idem.

right to just and satisfactory working conditions to derive their existence and implicit recognition in the OAS Charter."[57]

v. to the contrary, it establishes an obligation for action and not for results, consisting in the States Parties to the Convention undertaking "to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, […] the full realization of the rights" mentioned, a mandate that the judgment does not observe; and

vi. it indicates that the obligation of conduct that it establishes must be complied with "by legislation or other appropriate means and subject to available resources," which not only reinforces the lack of effectiveness of such rights, but conditions the possibility of complying with this obligation to the existence of the resources that the pertinent State has available for this and to the cooperation of other States.

42. In sum, it may be concluded that the rights in question are not, in the words of the Convention, "recognized,"[58] "set forth,"[59] "guaranteed,"[60] or "protected"[61] and[62] in or by it.

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[57] *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus v. Brazil. Preliminary objections, merits, reparations and costs. Judgment of July 15, 2020.* Series C No. 407, para. 155.

[58] Art. 1(1): "Obligation to Respect Rights. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

Art. 22(4): "Freedom of Movement and Residence: The exercise of the rights recognized in paragraph 1 may also be restricted by law in designated zones for reasons of public interest."

Art. 25(1): "Judicial Protection. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties."

Art. 29(a): "Restrictions Regarding Interpretation. No provision of this Convention shall be interpreted as: (a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein."

Art. 30: "Scope of Restrictions. The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established."

Art. 31: "Recognition of Other Rights. Other rights and freedoms recognized in accordance with the procedures established in Articles 76 and 77 may be included in the system of protection of this Convention."

Art.48(1)(f): "When the Commission receives a petition or communication alleging violation of any of the rights protected by this Convention, it shall proceed as follows: … (f) The Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention."

[59] Art. 45(1): "Any State Party may, when it deposits its instrument of ratification of or adherence to this Convention, or at any later time, declare that it recognizes the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention."

[60] Art. 47(b) "The Commission shall consider inadmissible any petition or communication submitted under Articles 44 or 45 if: … the petition or communication does not state facts that tend to establish a violation of the rights guaranteed by this Convention."

[61] Art.48: "1. When the Commission receives a petition or communication alleging violation of any of the rights protected by this Convention, it shall proceed as follows: (f) The Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention."

[62] Art.4(1): "Right to Life. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life."

43. It should also be pointed out that the judgment merely affirmed that the Court recalled that it had recognized and protected the right to work under Article 26 in several precedents,[63] indicating the corresponding judgments in the respective footnote.[64]

44. However, the right to work is not "a right protected by Article 26 of the Convention" or "a right recognized" by "Article 26"; rather, it is a right that would be derived "from the economic, social, educational, scientific and cultural standards contained in the [OAS] Charter"; in other words, it is a right that has its origin in the latter and not in the Convention.

45. In summary, the Convention does not "make a direct referral to the economic, social, educational, scientific, and cultural standards contained in the OAS Charter," as the Court's case law indicates; rather, at the most and as indicated here textually, the rights in question "may be derived interpretively from Article 26" and "their existence and recognition" would be "implicit in the Charter." Therefore, to determine those rights and consider them, in the terms of the Convention, "recognized," "established," "guaranteed," or "protected" in or by it – which are the only rights the violation of which is justiciable before the Court – it would be necessary to interpret the articles of the OAS Charter that are invoked, derive from them the corresponding rights and consider them recognized by that treaty – but not expressly, rather only implicitly – an intellectual exercise that is too far removed from the direct and clear statements of the Convention with regard to the rights to which it refers to take them into account to conclude that the latter are included in the Convention.

46. By taking this position, the Court's case law undoubtedly disregards the literal meaning of Article 26 and, consequently, does not apply to it, harmoniously, the provisions of Article 31(1) of the Vienna Convention or, strictly speaking, make an interpretation of this article. It would seem that, for the Court's case law, the literal meaning of what was agreed has no relevance and, therefore, it considers this a mere formality, which allows it to attribute to that article a meaning and scope that is very far from what the States expressly agreed, as if, in reality, they had wanted to agree something else, which, evidently, is totally illogical.

C. Subjective method

47. When trying to take into account the context of the terms of the Convention, it is necessary to allude to the system established in the Convention in which this is inserted; which means that:

a) This system is composed of the duties and rights that it establishes, the organs responsible for ensuring their respect and requiring compliance with them, and provisions relating to the Convention.[65]

Art. 63(1): "If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

[63] Para. 104.

[64] *Cf. Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2017. Series C No. 340, paras. 142 and 145. Similarly: *Case of the Discharged Employees of PetroPeru et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2017. Series C No. 344, and *Case of San Miguel Sosa et al. v. Venezuela. Merits, reparations and costs.* Judgment of February 8, 2018. Series C No. 348.

[65] "Part III, "General and Transitory Provisions."

b) Regarding the duties, these are two, namely: the "Obligation to Respect Rights"[66] and the obligation to ensure "Domestic Legal Effects,"[67] and with regard to the rights, they are the "Civil and Political Rights"[68] and the "Economic, Social and Cultural Rights."[69]

c) In the case of the organs, these are Commission, the Court and the OAS General Assembly; the first is responsible for the promotion and defense of human rights,[70] the second, for interpreting and applying the Convention[71] and the third for adopting the necessary measures to ensure compliance with the pertinent rulings;[72]

48. The harmonious interpretation of these provisions reveals that States that have accepted the Court's contentious jurisdiction can only be required – in relation to a case that has been submitted to the Court – to duly respect the civil and political rights "recognized," established," "guaranteed," or "protected" by the Convention and also, provided it eventually becomes necessary, to adopt "in accordance with [the] constitutional processes [of the corresponding State] and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."

49. To the contrary, with regard to the rights derived "from the economic, social, educational, scientific and cultural standards contained in the [OAS] Charter," the States can only be required to adopt, "by legislation or other appropriate means," "measures both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively […] the full realization" of the said rights, and this "subject to available resources."

50. That said, it is necessary to place on record, with regard to the application of this method of interpretation, that the OAS Charter incorporated "broader standards with respect to economic, social, and educational rights," and that the Convention determined "the structure, competence, and procedure of the organs responsible for these matters."[73]

51. In other words, it was the Convention itself that, in compliance with this mandate, gave civil and political rights a differentiated treatment from the economic, social and cultural rights, expressed, the former, in Chapter II of Part I of the Convention and the latter in Chapter III of the same part and instrument. Thus, the indivisibility of the civil and political rights and of

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[66] *Supra*, footnote 58.

[67] *Supra*, footnote 50.

[68] Part I, Chapter II, arts.3 to 25. Right to recognition of juridical personality (Art. 3), right to life, (Art. 4), right to personal integrity (Art. 5), freedom from slavery (Art. 6), right to personal liberty (Art. 7), right to a fair trial (Art. 8), freedom from *ex-post facto* laws (Art. 9), right to compensation (Art. 10), right to privacy (Art. 11), freedom of conscience and religion (Art. 12), freedom of thought and expression (Art. 13), right of reply (Art. 14), right of assembly (Art. 15), freedom of association (Art. 16), rights of the family (Art. 17), right to a name (Art. 18), rights of the child (Art. 19), right to nationality (Art. 20), right to property (Art. 21), freedom of movement and residence (Art. 22), right to participate in government (Art. 23), right to equal protection (Art. 24) and right to judicial protection (Art. 25).

[69] Supra, para. 32.

[70] *Supra*, footnote 18.

[71] *Supra,* footnote 10.

[72] Art. 65: "To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations."

[73] Preamble to the Convention, para. 5.

the economic, social and cultural rights to which the Preamble of the Convention refers is to the "enjoyment" of both types of human rights and not that they should be subject to the same rules for their exercise and international monitoring.

52. It is also necessary to bear in mind that, regarding what Article 31(2) of the Vienna Convention considers as context, there is no "agreement relating to the [Convention] which was made between all the parties in connection with the conclusion of the treaty" or "any instrument which was made by one or more parties in connection with the conclusion of the" Convention and "accepted by the other parties as an instrument related to" it.

53. Nor does there exist, together with the context, as established by Article 31(3) of the Vienna Convention, "any subsequent agreement between the parties regarding the interpretation" of the Convention "or the application of its provisions" or "any subsequent practice in the application of the treaty, which establishes the agreement of the parties regarding its interpretation," except for the Protocol of San Salvador.

54. Consequently, it is not acceptable that, in the absence of what is known in legal doctrine as the "authentic interpretation," the meaning and scope of the Convention are determined by the Court unrelated, and even in contradiction, to what was agreed by its States Parties. The Convention, as every treaty, does not exist outside of what the latter expressly agreed.

55. In support of its decision, the judgment mentions Article XIV of the American Declaration of the Rights and Duties of Man, Article 29(d) of the Convention, and General Comment No. 18 on the right to work of the United Nations Committee on Economic, Social and Cultural Rights. Regarding the first, it should be pointed out that, logically, it does not establish the justiciability before the Court of the right to work because, at the date of the Declaration, the Court did not exist.

56. Regarding the second, it is necessary to insist that it refers to the interpretation of the Convention that could limit or exclude the enjoyment and exercise or the effects of human rights recognized in the Convention, which is not the case of the rights derived from the OAS Charter. Moreover, neither does it refer to the justiciability of the right to work.

57. Lastly, regarding the reference to the United Nations Committee on Economic, Social and Cultural Rights, this is a body composed of 18 independent experts. In other words, it is not formed of State representatives and, moreover, it oversees the application of the International Covenant on Economic, Social and Cultural Rights by its States parties. Consequently, it bears no relationship to the Convention and thus it cannot possibly establish the justiciability before the Court of the right to work and, evidently, does not do so. In addition, it should be added that the comments of the said Committee constitute an aspiration, which is entirely legitimate, of change or development of the relevant international law.

58. Therefore, it is irrefutable that none of the texts cited – let me repeat, none – involves or establishes that presumed violations of the right to work, or of any of the other economic, social and cultural rights derived from the economic, social, educational, scientific, and cultural standards set forth in the OAS Charter can be submitted to the Court for it to rule on them.

59. It is necessary to add to the foregoing that nor do the references in the judgment to the domestic law of the State[74] justify its thesis that they provide authorization to have recourse to the Court for violations of the rights mentioned above. The Court's competence is

[74] Para. 105.

derived from the authority granted by the Convention and not by a provision of domestic law of the State in question even though evidently, as the said Article 29 indicates, this domestic law should be taken into account when interpreting the Convention to ensure that it does not limit the enjoyment and exercise of a right recognized by the Convention.

60. Regarding the above, it should be pointed out that the judgment itself indicates that "the legal issue raised by the presumed victim relates to the scope of the right to work and, in particular, the right to job stability, understood as a right protected by Article 26 of the American Convention."[75] Thus, the matter submitted to the Court was not the judicialization before the Court of the violations of this right, but rather its scope.

61. In addition, it should be noted that in other judgments handed down by the Court, a similar result to that sought in the instant case was achieved merely by applying the provisions of the Convention concerning rights that it does recognize and, logically, within their limits, without needing to resort to Article 26. Consequently, there appears to be no reason for the insistence in indicating the said article as grounds for the Court being able to examine violations of the human rights derived from the OAS Charter, when it is evident that this is not only superfluous but, in addition, could result in the violation of other rights – also considered to be derived from the economic, social, educational, scientific and cultural rights contained in the OAS Charter – being submitted to the Court's consideration and decision.

62. Therefore, from the foregoing it can be concluded that the application of the subjective method for the interpretation of treaties leads to the result indicated above: namely, and contrary to what the judgment indicates, that at no time were the economic, social and cultural rights derived from the standards of the OAS Charter, including the right to work, incorporated into the protection system established in the Convention.

D. Functional or teleological method

63. When trying to define the object and purpose of the article of the Convention in question, it can be affirmed that:

a) The purpose of the States when signing the Convention was "to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man";[76]

b) To this end, "the Third Special Inter-American Conference (Buenos Aires, 1967) approved the incorporation into the Charter of the Organization [of American States] itself of broader standards with respect to economic, social, and educational rights and resolved that an inter-American convention on human rights should determine the structure, competence, and procedure of the organs responsible for these matters";

c) Accordingly, it is clear that what was decided at the said Conference with regard to the economic, social, and educational rights was fulfilled with the Protocol of Buenos Aires and with regard to the structure, competence, and procedure of the organs responsible for these matters, with the Convention; and

d) Therefore, it was to comply with that mandate that Article 26 was included in the Convention in a separate chapter from the one concerning the political and civil rights and, also, establishing a special obligation for the States Parties to the Convention, which does not

[75] Para. 104.
[76] Preamble, para. 1.

exist with regard to the latter rights; namely, that of adopting "measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, […] the full realization of the rights" to which it referred and that, "by legislation or other appropriate means and subject to available resources."

64. In other words, the object and purpose of Article 26 is that the measures it indicates should be adopted to achieve the realization of the rights it indicates and not that they are enforceable immediately or, especially, that they are justiciable before the Court. In this regard, it should be recalled that the title of the article is "Progressive Development" and that of Chapter III – of which it is the only article – "Economic, Social and Cultural Rights," from which it can be understood that what this article establishes – its object and purpose – is that measures should be adopted to achieve, progressively, the realization of the rights to which it refers, and not that they have already been realized.

65. Accepting that, in order to interpret a specific provision of the Convention, it would be sufficient to evoke its general object and purpose as indicated above, which is very vague and imprecise, would affect the legal security and certainty that should characterize all the Court's rulings, because it would leave to the Court with a wide margin of discretion to determine the rights that derive from the said standards of the OAS Charter, so that the States Parties to the Convention would not know which these rights were prior to the corresponding proceedings.

66. This is why I am unable to share the opinion set forth in the Court's case law that, based on the provisions of Articles 1 and 2 of the Convention, Article 26 differentiates between "aspects that can be enforced immediately" and "aspects that have a progressive nature,"[77] because this is far removed from what is stipulated in the said articles which establish that the rights to which they refer are only those "recognized," "established," "guaranteed," or "protected" in or by the Convention, which is not the case of those alluded to in Article 26. In addition, this distinction made in the judgment would, in itself, be confusing and even contradictory because, on the one hand, it would not be possible to know with certainty and prior to the proceedings, which aspects, or more exactly, which of the rights that Article 26 alludes to would be enforceable immediately and which would require progress to be made towards this end and, on the other hand, the former would not require the adoption of measures to be enforceable, while the others could not be enforced until measures had been adopted.

67. In addition, a process such as the one mentioned would lead the Court to assume the international legislative function that, in the case of the Convention, only corresponds to its States Parties.[78] And, this is because, in the absence of the specification of the rights that are derived from the standards of the OAS Charter, the Court could establish rights that were not expressly included in the said standards and determine that they are justiciable before it.

68. Ultimately, dissenting from the judgment, it can be asserted that the application of the functional or teleological method for the interpretation of treaties to Article 26 of the Convention leads to the same conclusion that was reached by using the other means for the interpretation of treaties; namely, that the purpose of the said article is not to establish any human right, but merely to enshrine the duty of its States Parties to adopt measures to realize the economic, social and cultural rights that are derived from the OAS Charter.

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[77] *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of July 15, 2020. Series C No. 407, Para. 172.

[78] *Supra*, footnote 25.

E. Supplementary means

69. With regard to the supplementary means for the interpretation of treaties,[79] it should be underlined that, during the 1969 Inter-American Specialized Conference on Human Rights at which the definitive text of the Convention was adopted, two articles were proposed on this matter. One was Article 26 as it appears in the Convention. This article was adopted.[80]

70. The other proposed article, number 27, indicated:

> "Monitoring Compliance with the Obligations. The States Parties shall transmit to the Inter-American Commission of Human Rights a copy of each of the reports and studies that they submit annually to the Executive Committees of the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture, in their respective fields, so that the Commission can verify their compliance with the obligations determined previously, which are the essential basis for the exercise of the other rights enshrined in this Convention."

71. It should be noted that the said draft article 27, which was not adopted,[81] referred to "reports and studies" for the Commission to verify whether the States were complying with the said obligations and, therefore, distinguished between, on the one hand, "the obligations determined previously," obviously in Article 26 – in other words, those relating to the rights derived from "the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires" and, on the other hand, "the other rights enshrined in this Convention"; that is, the "civil and political rights."

72. Thus, the adoption of Article 26 was not intended to incorporate the economic, social and cultural rights into the protection system established in the Convention. The only intention was that compliance with the obligations concerning those rights should be submitted to the examination of the OAS organs, considering that this compliance was the basis for the exercise of the civil and political rights. Moreover, as indicated, this proposal was not adopted. This confirms that the States Parties to the Convention had no intention whatsoever of including the economic, social and cultural rights in the protection system that the Convention does establish for the civil and political rights.[82]

IV. THE OAS CHARTER

73. Consequently, since Article 26 refers to "the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires," in order to understand the scope of the article it is

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[79] Art. 32 of the Vienna Convention: "Supplementary means of interpretation. Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable."

[80] *Actas de la Conferencia Especializada Interamericana sobre Derechos Humanos*, November 7 to 22, 1969, OEA/Ser.K/XVI/1.2, p. 318.

[81] *Actas de la Conferencia Especializada Interamericana sobre Derechos Humanos,* November 7 to 22, 1969, OEA/Ser.K/XVI/1.2, p. 448.

[82] Concurring opinion of Judge Alberto Pérez Pérez, *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2015.

essential to refer to the content of the said standards and, in particular, those cited in the judgment.

74. Regarding the right to work, the judgment cites Articles 45(b) and (c),[83] 46[84] and 34(g)[85] of the OAS Charter.

75. A single reading of the said standards is sufficient to understand, clearly and without the slightest doubt, that they establish obligations of action or conduct, expressed by "every effort" that the States should make to achieve the application of the "principles" and "mechanisms" indicated (which include the right to work), or to facilitate the process of Latin American regional integration, the harmonization of the social legislation and the protection of workers' rights, or to achieve the "basic objectives" of "fair wages, employment opportunities, and acceptable working conditions for all."

76. It should not be forgotten that all the articles cited are to be found in Chapter VII of the Charter, entitled "Integral Development." In this regard, it should be borne in mind that this Chapter begins by establishing that:

> "The Member States, inspired by the principles of inter-American solidarity and cooperation, pledge themselves to a united effort to ensure international social justice in their relations and integral development for their peoples, as conditions essential to peace and security. Integral development encompasses the economic, social, educational, cultural, scientific, and technological fields through which the goals that each country sets for accomplishing it should be achieved."

77. In other words, it establishes the general obligation of the States of the Americas to make a united effort to ensure social justice and integral development. It does not establish that they respect or ensure human rights. And, it is that premise that underlines the whole of the said Chapter VII.

78. Thus, the said standards do not establish obligations of result; that is, they do not establish that the human rights derived from the said standards must be respected, but rather that "every effort" must be made to achieve the "principles," "mechanisms," and "goals" that it indicates. In other words, the standards in question, although they allude to the right to work, to the rights of workers, and to working conditions, do so insofar as this is the basis,

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[83] Art.45: "The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms: […] (b) Work is a right and a social duty, it gives dignity to the one who performs it, and it should be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working; (c) Employers and workers, both rural and urban, have the right to associate themselves freely for the defense and promotion of their interests, including the right to collective bargaining and the workers' right to strike, and recognition of the juridical personality of associations and the protection of their freedom and independence, all in accordance with applicable laws; […]

[84] Art.46: "The Member States recognize that, in order to facilitate the process of Latin American regional integration, it is necessary to harmonize the social legislation of the developing countries, especially in the labor and social security fields, so that the rights of the workers shall be equally protected, and they agree to make the greatest efforts possible to achieve this goal."

[85] Art. 34(g) of the OAS Charter: "The Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development. To achieve them, they likewise agree to devote their utmost efforts to accomplishing the following basic goals: …. (g) Fair wages, employment opportunities, and acceptable working conditions for all."

origin, reason or goal[86] for or towards which every effort must be made to achieve them or for them to become a reality.

79. With that in mind, the range of possibilities from which the interpreter could "derive" human rights not expressly established in any international norm would be enormous, not to say unlimited. It is sufficient to read what the articles of the OAS Charter indicated in the judgment mention as "basic goals"[87] or as "*principles and mechanisms"*[88] or as the "*goal,"*[89] to realize, without any room for doubt, that the purpose of the said articles is not to establish any right and, especially, the justiciability before the Court of its violation, but simply to set forth aspirations that should be achieved by compliance with obligations of conduct, expressed by the deployment of "every effort" that the OAS Member States should make to this end.

80. If the Court continues with this course of action, and takes it to its extreme, all the States Parties to the Convention that have accepted its jurisdiction could eventually be brought before it because they had not fully achieved one of the "principles," "goals," "mechanisms" or "objectives" contemplated in the OAS Charter from which the judgment derives rights, which would clearly appear to be very far from what the States Parties intended when signing

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[86] Diccionario de la Lengua Española, Real Academia Española, 2020.

[87] Art. 34: "The Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development. To achieve them, they likewise agree to devote their utmost efforts to accomplishing the following basic goals: (a) Substantial and self-sustained increase of per capita national product; (b) Equitable distribution of national income; (c) Adequate and equitable systems of taxation; (d) Modernization of rural life and reforms leading to equitable and efficient land-tenure systems, increased agricultural productivity, expanded use of land, diversification of production and improved processing and marketing systems for agricultural products; and the strengthening and expansion of the means to attain these ends; (e) Accelerated and diversified industrialization, especially of capital and intermediate goods; (f) Stability of domestic price levels, compatible with sustained economic development and the attainment of social justice; (g) Fair wages, employment opportunities, and acceptable working conditions for all; (h) Rapid eradication of illiteracy and expansion of educational opportunities for all; (i) Protection of man's potential through the extension and application of modern medical science; (j) Proper nutrition, especially through the acceleration of national efforts to increase the production and availability of food; (k) Adequate housing for all sectors of the population; (l) Urban conditions that offer the opportunity for a healthful, productive, and full life; (m) Promotion of private initiative and investment in harmony with action in the public sector; and (n) Expansion and diversification of exports."

[88] Art.45: "The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms: (a) All human beings, without distinction as to race, sex, nationality, creed, or social condition, have a right to material well-being and to their spiritual development, under circumstances of liberty, dignity, equality of opportunity, and economic security; (b) Work is a right and a social duty, it gives dignity to the one who performs it, and it should be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working; (c) Employers and workers, both rural and urban, have the right to associate themselves freely for the defense and promotion of their interests, including the right to collective bargaining and the workers' right to strike, and recognition of the juridical personality of associations and the protection of their freedom and independence, all in accordance with applicable laws; (d) Fair and efficient systems and procedures for consultation and collaboration among the sectors of production, with due regard for safeguarding the interests of the entire society; (e) The operation of systems of public administration, banking and credit, enterprise, and distribution and sales, in such a way, in harmony with the private sector, as to meet the requirements and interests of the community; (f) The incorporation and increasing participation of the marginal sectors of the population, in both rural and urban areas, in the economic, social, civic, cultural, and political life of the nation, in order to achieve the full integration of the national community, acceleration of the process of social mobility, and the consolidation of the democratic system. The encouragement of all efforts of popular promotion and cooperation that have as their purpose the development and progress of the community; (g) Recognition of the importance of the contribution of organizations such as labor unions, cooperatives, and cultural, professional, business, neighborhood, and community associations to the life of the society and to the development process; (h) Development of an efficient social security policy; and (i) Adequate provision for all persons to have due legal aid in order to secure their rights."

[89] *Supra*, footnote 86.

the Convention or, at least, from the logic implicit in it, especially, due to the way in which the said Chapter VII was drafted.

81. This is particularly evident, for example, as regards the "[a]ccelerated and diversified industrialization, especially of capital and intermediate goods," the "[s]tability of domestic price levels, compatible with sustained economic development and the attainment of social justice," the "[p]romotion of private initiative and investment in harmony with action in the public sector," the "[e]xpansion and diversification of exports, "[t]he operation of systems of public administration, banking and credit, enterprise, and distribution and sales, in such a way, in harmony with the private sector, as to meet the requirements and interests of the community," and the facilitation of "the process of Latin American regional integration." It is, at the very least, questionable that, on the basis of these assertions, the Court has wanted to derive human rights relating to these issues which, anyway, are part of the State's internal, domestic and exclusive jurisdiction.[90]

82. Therefore, based on all the foregoing, it is evident that, contrary to what is indicated in the instant case, "the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires" to which Article 26 refers do not signify the competence of the Court to hear and decide possible violations of the rights "derived" from them.

V. THE PROTOCOL OF SAN SALVADOR

83. Furthermore, it is necessary to refer to the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), which is also cited in the Court's case law to support its interpretation of Article 26;[91] however, to the contrary, the undersigned considers that its signature and validity support what is maintained in this opinion.

84. This instrument[92] was adopted as a result of the provisions of Articles 31, 76 and 77[93] of the Convention, and this is indicated in its Preamble which indicates that:

> "Bearing in mind that, although fundamental economic, social and cultural rights have been recognized in earlier international instruments of both world and regional scope, it is essential that those rights be reaffirmed, developed, perfected and protected in order to consolidate in America, on the basis of full respect for the rights of the individual, the democratic representative form of government as well as the right of its peoples to development, self-determination, and the free disposal of their wealth and natural resources; and [c]onsidering that the American Convention on Human Rights provides that draft additional protocols to that Convention may be submitted for consideration to the States Parties, meeting together on the occasion of the General Assembly of the Organization of American States, for the purpose of gradually incorporating other rights and freedoms into the protective system thereof."

85. The above reveals that this is an agreement additional to the Convention, whose specific purpose is to reaffirm, develop, perfect and protect the economic, social and cultural

[90] *Supra,* footnote 23.

[91] *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of July 15, 2020. Series C No. 407, para. 161.

[92] Hereinafter, the Protocol.

[93] *Supra*, footnote 25.

rights and to gradually incorporated them into the Convention's protection system and achieve their full realization.

86. In other words, the Protocol was adopted because, at the date of its signature, the economic, social and cultural rights had not been reaffirmed, developed, perfected and protected or included in the protection system of the Convention, which means that they had not been fully realized based on Article 26. Otherwise, it would be difficult to understand either the purpose or the utility of the Protocol.

87. From this perspective, the Protocol recognizes,[94] establishes,[95] sets forth[96] and[97] the following rights: the right to work (Art. 6), the right to just, equitable, and satisfactory conditions of work (Art. 7), trade union rights (Art. 8), the right to social security (Art. 9), the right to health (Art. 10), the right to a healthy environment (Art. 11), the right to food (Art. 12), the right to education (Art. 13), the right to the benefits of culture (Art. 14), the right to the formation and the protection of families (Art. 15), the rights of children (Art. 16), the protection of the elderly (Art. 17) and the protection of the handicapped (Art. 18). It should be recalled that, to the contrary, Article 26 does not establish or set forth any right, it merely refers to those derived from the OAS Charter.

88. And regarding those rights recognized by the Protocol, the States Parties undertake to adopt, gradually, measures to ensure their full effectiveness (Arts. 6(2), 10(2), 11(2) and 12(2)). This coincides with the provisions of Article 26; that is, both the Protocol and the said article relate to rights that have not been realized or not fully.

89. The Protocol also includes a provision, Article 19, concerning the means of protection of the above-mentioned rights. Those means consist in the reports that the States Parties

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[94] Art. 1: "Obligation to Adopt Measures. The States Parties to this Additional Protocol to the American Convention on Human Rights undertake to adopt the necessary measures, both domestically and through international cooperation, especially economic and technical, to the extent allowed by their available resources, and taking into account their degree of development, for the purpose of achieving progressively and pursuant to their internal legislations, the full observance of the rights recognized in this Protocol."

Art. 4: *"Inadmissibility of Restrictions.* A right which is recognized or in effect in a State by virtue of its internal legislation or international conventions may not be restricted or curtailed on the pretext that this Protocol does not recognize the right or recognizes it to a lesser degree.

[95] Art. 5: "Scope of Restrictions and Limitations. The State Parties may establish restrictions and limitations on the enjoyment and exercise of the rights established herein by means of laws promulgated for the purpose of preserving the general welfare in a democratic society only to the extent that they are not incompatible with the purpose and reason underlying those rights.

Art. 19(6): "Any instance in which the rights established in paragraph a) of Article 8 and in Article 13 are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights.

[96] Art. 2*:* "Obligation to Enact Domestic Legislation. If the exercise of the rights set forth in this Protocol is not already guaranteed by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Protocol, such legislative or other measures as may be necessary for making those rights a reality."

Art. 3: "Obligation of Non-discrimination. The State Parties to this Protocol undertake to guarantee the exercise of the rights set forth herein without discrimination of any kind for reasons related to race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition."

[97] Art. 19: "Means of Protection. 1. Pursuant to the provisions of this article and the corresponding rules to be formulated for this purpose by the General Assembly of the Organization of American States, the States Parties to this Protocol undertake to submit periodic reports on the progressive measures they have taken to ensure due respect for the rights set forth in this Protocol."

must present to the OAS General Assembly "on the progressive measures they have taken to ensure due respect for the rights set forth in this Protocol," in the treatment accorded to those reports by the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture of the OAS, and in the opinion that the Commission may eventually provide on the matter.[98] It should be noted that this provision is similar to draft article 27 of the Convention that was rejected by the corresponding Conference.

90. All the foregoing means, first, that for the States Parties to the Protocol, the realization of the economic, social and cultural rights is of a progressive nature; *a contrario sensu,* they are not in force or, at least, not fully in force.

91. Second, consequently, this signifies for the said States that the provisions of Article 26 mean that the said rights are not included among those to which the protection system established in the Convention applies or that are in force; because, to the contrary, the adoption of the Protocol would have been unnecessary.

92. It should also be borne in mind that the OAS created the Working Group to Examine the Progress Reports of the States Parties to the Protocol[99] as a mechanism to monitor compliance with the undertakings made in the said instrument. This undoubtedly confirms that the intention of the said State was to create a non-jurisdictional mechanism for the international supervision of compliance with the Protocol.

93. The only exception to this system is established in Article 19(6), which states that:

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[98] Art. 19: "Means of Protection. 1. Pursuant to the provisions of this article and the corresponding rules to be formulated for this purpose by the General Assembly of the Organization of American States, the States Parties to this Protocol undertake to submit periodic reports on the progressive measures they have taken to ensure due respect for the rights set forth in this Protocol.

2. All reports shall be submitted to the Secretary General of the OAS, who shall transmit them to the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture so that they may examine them in accordance with the provisions of this article. The Secretary General shall send a copy of such reports to the Inter-American Commission on Human Rights.

3. The Secretary General of the Organization of American States shall also transmit to the specialized organizations of the inter-American system of which the States Parties to the present Protocol are members, copies or pertinent portions of the reports submitted, insofar as they relate to matters within the purview of those organizations, as established by their constituent instruments.

4. The specialized organizations of the inter-American system may submit reports to the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture relative to compliance with the provisions of the present Protocol in their fields of activity.

5. The annual reports submitted to the General Assembly by the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture shall contain a summary of the information received from the States Parties to the present Protocol and the specialized organizations concerning the progressive measures adopted in order to ensure respect for the rights acknowledged in the Protocol itself and the general recommendations they consider to be appropriate in this respect.

6. Any instance in which the rights established in paragraph a) of Article 8 and in Article 13 are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights.

7. Without prejudice to the provisions of the preceding paragraph, the Inter-American Commission on Human Rights may formulate such observations and recommendations as it deems pertinent concerning the status of the economic, social and cultural rights established in the present Protocol in all or some of the States Parties, which it may include in its Annual Report to the General Assembly or in a special report, whichever it considers more appropriate.

8. The Councils and the Inter-American Commission on Human Rights, in discharging the functions conferred upon them in this article, shall take into account the progressive nature of the observance of the rights subject to protection by this Protocol.

[99] AG/RES. 2262 (XXXVII-O/07) of June 5, 2007.

> "Any instance in which the rights established in paragraph a) of Article 8[100] and in Article 13[101] are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights."

94. This means that only in the event of a violation of the rights relating to trade unions and to education are the pertinent cases justiciable before the Court. To the contrary, with regard to the violation of the other rights, which include the other aspects of the right to work, only the system of reports established in Article 19 of the Protocol is in order.

95. Consequently, the Protocol is an amendment to the Convention. This is revealed by its very text because it is considered a protocol, a mechanism expressly established in the Convention.[102] Also, its Preamble places on record that it is adopted considering that the Convention establishes that possibility.[103] Thus, it is an "additional protocol" to the Convention signed "for the purpose of gradually incorporating other rights and freedoms into the protective system thereof," which, therefore, did not include them.

96. Consequently, this instrument, by establishing in its Article 19 the competence of the Court to examine possible violations of the rights concerning trade unions and education is not limiting the Court; rather, to the contrary, it is expanding its competence. If the Protocol did not exist, the Court could not even examine the possible violation of those rights.

97. All the foregoing is, consequently, evident proof that, for the States Parties to the Protocol, the provisions of Article 26 of the Convention cannot be interpreted to mean that it establishes or recognizes economic, social and cultural rights or that it authorizes cases in which they are violated to be submitted to the consideration of the Court. Let me repeat that, if it had established this, obviously there would have been no need for the Protocol. It was for

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[100] Art. 8: "Trade Union Rights. 1. The States Parties shall ensure: (a) The right of workers to organize trade unions and to join the union of their choice for the purpose of protecting and promoting their interests. As an extension of that right, the States Parties shall permit trade unions to establish national federations or confederations, or to affiliate with those that already exist, as well as to form international trade union organizations and to affiliate with that of their choice. The States Parties shall also permit trade unions, federations and confederations to function freely."

[101] Art. 13: "Right to Education. 1. Everyone has the right to education. 2. The States Parties to this Protocol agree that education should be directed towards the full development of the human personality and human dignity and should strengthen respect for human rights, ideological pluralism, fundamental freedoms, justice and peace. They further agree that education ought to enable everyone to participate effectively in a democratic and pluralistic society and achieve a decent existence and should foster understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups and promote activities for the maintenance of peace. 3. The States Parties to this Protocol recognize that in order to achieve the full exercise of the right to education: a. Primary education should be compulsory and accessible to all without cost; b. Secondary education in its different forms, including technical and vocational secondary education, should be made generally available and accessible to all by every appropriate means, and in particular, by the progressive introduction of free education; c. Higher education should be made equally accessible to all, on the basis of individual capacity, by every appropriate means, and in particular, by the progressive introduction of free education; d. Basic education should be encouraged or intensified as far as possible for those persons who have not received or completed the whole cycle of primary instruction; e. Programs of special education should be established for the handicapped, so as to provide special instruction and training to persons with physical disabilities or mental deficiencies. 4. In conformity with the domestic legislation of the States Parties, parents should have the right to select the type of education to be given to their children, provided that it conforms to the principles set forth above. 5. Nothing in this Protocol shall be interpreted as a restriction of the freedom of individuals and entities to establish and direct educational institutions in accordance with the domestic legislation of the States Parties."

[102] *Supra*, footnote 25.

[103] *Supra*, para. 84.

that reason that it was necessary to adopt it. Its signature cannot be explained in any other way.

98. Based on the above, it can be concluded that the Protocol is, consequently, the clear demonstration that the provisions of Article 26 do not establish any human right.

VI. CONCLUSIONS

99. Therefore, it is based on all the above, including the comments in the Preliminary observations,[104] that I dissent from the judgment; in particular, from the text of its second operative paragraph.[105]

100. In this regard, it is necessary to point out that, by rejecting the preliminary objection of lack of jurisdiction to examine violations of human rights invoking the application of Article 26, the judgment leaves no space for this dissenting opinion to rule on its other operative paragraphs. In other words, by maintaining in this opinion that the Court lacks the said jurisdiction, logically, I am asserting that it was not in order for it to rule on the merits of the case, as it has. The only exception to this is the contents of the eleventh operative paragraph, which I have voted in favor of simply because it repeats what is established in the Court's Rules of Procedure,[106] and therefore, even if it had not been included, it would be applied.

101. In addition, it would appear desirable to insist, once again, that this opinion does not concern the existence of the right to work in the sphere of international law. This falls outside its purpose. It merely maintains that the possible violation of this right cannot be submitted to the consideration and decision of the Court.

102. Furthermore, this opinion should not be understood to signify that I would not be in favor of the eventual judicialization of the economic, social and cultural rights. In this regard, I consider that, if the jurisdictional competence is established, this should be done by those responsible for the international legislative function. It does not seem desirable that the organ responsible for the inter-American judicial function should assume that other function, especially when the States to which the latter corresponds are democratic and, in this regard, governed by the Inter-American Democratic Charter,[107] which establishes the separation of powers and civic participation in public affairs, and which, without doubt, the Court should also respect within its own area of activity.

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[104] *Supra*, II.

[105] *Supra*, footnote 3.

[106] Art. 69. "Monitoring compliance with judgments and other decisions of the Court.

1. The procedure for monitoring compliance with the judgments and other decisions of the Court shall be carried out through the submission of reports by the State and observations to those reports by the victims or their legal representatives. The Commission shall present observations to the State's reports and to the observations of the victims or their representatives.

2. The Court may require from other sources of information relevant data regarding the case in order to evaluate compliance therewith. To that end, the Court may also request the expert opinions or reports that it considers appropriate.

3. When it deems it appropriate, the Court may call the State and the victims' representatives to a hearing in order to monitor compliance with its decisions; the Court shall hear the opinion of the Commission at that hearing.

4. Once the Court has obtained all relevant information, it shall determine the state of compliance with its decisions and issue the relevant orders.

5. These rules also apply to cases that have not been submitted by the Commission.

[107] Adopted at the twenty-eighth special session of the OAS General Assembly held in Lima, Peru, on September 11, 2001.

103. It is also essential to repeat that, if the Court persists in the direction adopted by this judgment, the inter-American system of human rights as a whole could be seriously constrained. And this is because very probably, on the one hand, it would not provide an incentive, but rather the contrary, for the adhesion to the Convention of new States, or the acceptance of the Court's contentious jurisdiction by those who have not done so and, on the other hand, the tendency of the States Parties to the Convention not to comply fully and promptly with its rulings could be renewed or even increased. In sum, it would weaken the principles of legal security and certainty, which, in the case of human rights, also benefit the victims of their violation by ensuring compliance with the Court's judgments because they are solidly based on the undertakings sovereignly made by the States.

104. Regarding the last point, it should be recalled that, in practice and over and above any theoretical consideration, the Court's function is, in particular, to deliver judgments that re-establish as soon as possible respect for the human rights violated in any specific case. It is not so sure that this is achieved with regard to violations of rights that were not considered justiciable before the Court in the Convention, or when, rather than trying to decide the case submitted to it, it would appear that the main concern has been to establish norms, rules or standards of general application and not to specifically deliver judgment in a case and that, based on this and on several judgments delivered in the same sense or in the same direction, case law is consequently developed composed of several similar precedents.

Eduardo Vio Grossi
Judge

Pablo Saavedra Alessandri
Secretary

CONCURRING AND PARTIALLY DISSENTING OPINION OF JUDGE HUMBERTO ANTONIO SIERRA PORTO

INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF CASA NINA *V.* PERU

JUDGMENT OF NOVEMBER 24, 2020
(Preliminary objections, merits, reparations and costs)

1. With my usual respect for the majority decision of the Inter-American Court of Human Rights (hereinafter "the Court"), the purpose of this opinion is to point out some discrepancies with the Court's analysis of the merits in relation to the international responsibility of the State of Peru (hereinafter "the State" or "Peru"). Also, to explain my partial dissent with the third operative paragraph which declares violations of judicial guarantees, together with the right to remain in the post under general conditions of equality and the right to work of Julio Casa Nina.

2. On this basis, I will address the following points: (i) the practice of addressing the alleged violations in a single operative paragraph and the justiciability of the economic, social, cultural and environmental rights; (ii) the ambivalent interpretation of Article 23 in relation to the removal from office of public officials; (iii) the absence of a relationship between the notions of job stability and the criteria that condition provisional appointments: the term, and (iv) the scope of the concept of control of conventionality in relation to the obligation to amend provisions of domestic law and the concept of an effective judicial remedy.

3. This opinion supplements the position already expressed in my partially dissenting opinions in the cases of *Lagos del Campo v. Peru,*[1] *Dismissed Employees of PetroPeru et al. v. Peru,*[2] *San Miguel Sosa et al. v. Venezuela,*[3] *Cuscul Pivaral et al. v. Guatemala,*[4] *Muelle Flores v. Peru,*[5] *the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru,*[6] *Hernández v. Argentina*[7] and *the Indigenous Communities of the Lhaka Honhat (Our Land) Association) v. Argentina;*[8] as well

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1 *Cf. Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 340. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

2 *Cf. Case of the Discharged Employees of PetroPeru et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2017. Series C No. 344. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

3 *Cf. Case of San Miguel Sosa et al. v. Venezuela. Merits, reparations and costs.* Judgment of February 8, 2018. Series C No. 348. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

4 *Cf. Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

5 *Cf. Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

6 *Cf. Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 21, 2019. Series C No. 394. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

7 *Cf. Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2019. Series C No. 395. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

8 *Cf. Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, reparations and costs.* Judgment of February 6, 2020. Series C No. 400. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

as my concurring opinions in the cases of *Gonzales Lluy et al. v. Ecuador*[9] and *Poblete Vilches et al. v. Chile.*[10]

i) The practice of addressing the alleged violations in a single operative paragraph and the justiciability of the economic, social, cultural and environmental rights

4. In previous separate opinions I have described in detail numerous arguments that reveal the logical and legal contradictions and inconsistencies from which the theory of the direct and autonomous justiciability of the economic, social, cultural and environmental rights (hereinafter "ESCER") under Article 26 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") suffers. Indeed, this position assumed by the majority of the Court's judges since the case of *Lagos del Campo v. Peru* disregards the rules of interpretation of the Vienna Convention on the Law of Treaties,[11] distorts the nature of the obligation of progressivity,[12] ignores the intention of the States reflected in the Protocol of San Salvador,[13] and undermines the Court's legitimacy;[14] just to mention some of the arguments.

5. On this occasion, it is not my intention to dwell on the points indicated above, but rather to focus attention on a practice related to this legal position that is manifested when declaring the violations in the operative paragraphs and also when addressing the allegations in a single chapter.

6. First, as I have pointed out in the cases of the *National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru*[15] and *Hernández v. Argentina,*[16] the Court has randomly and without justification, modified its method of presenting the operative paragraphs of its decisions, seeking to render invisible the internal disagreements concerning the scope of Article 26.

7. Furthermore, this method, which groups together in a single operative paragraph the declaration of all the violations, avoids revealing the divergent positions concerning the justiciability of the ESCER to the detriment of the legitimacy conferred by the unanimous position of the Court in relation to the other rights that were violated. I refer to the fact that, although the principal legitimacy, or legitimacy of origin, of the Court's decisions is based on the majority established in the Rules of Procedure, this is evidently perceived more clearly when all the judges are in agreement with the final decision. In this case, the fact of grouping

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[9] *Cf. Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 1, 2015. Series C No. 298. Concurring opinion of Judge Humberto Antonio Sierra Porto.

[10] *Cf. Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349. Concurring opinion of Judge Humberto Antonio Sierra Porto.

[11] *Cf. Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto, para. 13.

[12] *Cf. Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto, para. 10.

[13] *Cf. Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349. Concurring opinion of Judge Humberto Antonio Sierra Porto, para. 3.

[14] *Cf. Case of the Discharged Employees of PetroPeru et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2017. Series C No. 344. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto, para. 23.

[15] *Cf. Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 21, 2019. Series C No. 394. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto, para. 6.

[16] *Cf. Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2019. Series C No. 395. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto, para. 17.

together in a single operative paragraph the violations of Articles 8(1), 23(1)(c) and 26, did not show the unanimity of the Court in condemning the violations, or the partial discrepancy in relation to Article 26.

8. Second, in this case, the majority considered that it was appropriate to address the arguments on the merits in a single section and to declare the violation of judicial guarantees, the right to remain in the post under general conditions of equality and also the right to work of Mr. Casa Nina in a single operative paragraph. As can be observed from the examination of the merits, which analyzes the alleged violation of the right to work in only two paragraphs (108 and 109), it is clear that this is only explained and justified by its relationship to the right to remain in office under general conditions of equality. Thus, this not only demonstrates the futility of the analysis of Article 26 of the Convention, but also highlights how the method of grouping the alleged violations in a single chapter blurs the edges of the rights protected by the Convention and weakens the quality of the Court's arguments when substantiating the alleged violations.

9. This foregoing is the reason for this separate opinion because, although I agree with the declaration of the violation of Articles 8(1) and 23(1)(c) and, consequently, voted in favor of the third operative paragraph, I only did so due to the violation of those two articles. The method used by the Court in this judgment did not allow me to adequately express my legal position, because I consider that, not only is the justiciability of the right to work not legally viable in the proceedings before the IACtHR, but even that, based on the criteria developed in case law, the violation of Article 26 has not been proved in this case.

ii) The ambivalent interpretation of Article 23 in relation to the removal from office of public officials

10. In addition to the criteria that led me to accord my partial vote to the third operative paragraph, I find it relevant to refer to some problematic elements of the analysis of the merits, starting with the interpretation of the meaning and scope of Article 23 of the Convention. In the instant case, the Court found that the violation of the right of access to public office under general conditions of equality had been violated, considering that the decision that terminated the appointment of Mr. Casa Nina was arbitrary, since it did not respond to the permitted causes in order to ensure his independence in the office of provisional prosecutor. Even though I agree with this reasoning, I should note that the Court overlooked a very important debate that the case again brought to the table related not to Article 23(1)(c) but rather to Article 23(2).

11. The instant case elaborated on a jurisprudential position based on previous decisions relating to judicial officials[17] in relation to the criteria for removal from office, in which the issue of the literal interpretation of the limitations to political rights contemplated in Article 23 was not addressed. The Court indicated, "[…] this specific guarantee for prosecutors, applied in the same way as the protection mechanisms recognized for judges results in the following: (i) that removal from office is exclusively due to the permitted causes, either by a proceeding that complies with judicial guarantees or because the mandate has ended; (ii) that prosecutors can only be dismissed because of serious disciplinary offenses or incompetence, and (iii) that any process against prosecutors must be settled using fair, objective and impartial proceedings, pursuant to the Constitution or the law, because the discretionary removal of

[17] *Cf. Case of López Lone et al. v. Honduras. Preliminary objection, merits, reparations and costs.* Judgment of October 5, 2015. Series C No. 302, and *Case of Rico v. Argentina. Preliminary objection and merits.* Judgment of September 2, 2019. Series C No. 383.

prosecutors gives rise to the objective doubt about their effective possibility of exercising their functions without fear of reprisals."[18]

12. To the contrary, in the recent decision in the case of *Petro Urrego v. Colombia,* the Court reiterated the position taken in the case of *López Mendoza v. Venezuela*[19] according to which "[…] Article 23(2) of the American Convention makes clear that this instrument does not allow any administrative body to apply a sanction involving a restriction (for example, imposing a sanction of disqualification or dismissal) on someone due to social misconduct (in the performance of public service or outside of this) that affects the exercise of their political rights to elect and be elected. This may only occur through a judicial act (judgment) by a competent judge in the corresponding criminal proceedings."[20] On this occasion, although the Court based its position on a literal and teleological interpretation of the article, it accorded a differentiated category to the political rights of officials elected by popular vote, which is not justified by the literal meaning of the article, without explaining the grounds for its position.

13. The fact is that neither then nor now has the Court addressed the fact that Article 23 does not recognize differences in treatment between the political rights of public officials based on the manner of their appointment, even though it has founded its reasoning on an interpretation that is fundamentally literal.[21] Moreover, the Court has not provided sufficient arguments when propounding differences in the level of protection of the rights of public officials in its case law.

14. In addition, the void persists between the scope of Article 23(2) and the specificity of the hypotheses proposed for the limitation of political rights. The decision explicitly indicates that, in the case of prosecutors, removal from office – as a form of limitation of political rights – is acceptable under the Convention even though this was not ordered based on "sentencing by a competent court in criminal proceedings." The latter also leads us to consider that the Convention does not establish an absolute prohibition that, in certain circumstances, prevents disciplinary law affecting stability in office.

iii) The absence of a relationship between the notions of job stability and the criteria that condition provisional appointments: the term

15. As I indicated when referring to the Court's practice of addressing the alleged violations in a single chapter, blurring the scope of each of the Convention's rights and affecting the solidity and rigor of the decision, I consider that the analysis made in this case of the right to job stability in relation to judicial guarantees and the right of access to public office under general conditions of equality leads to confusions that result in a reduction in its sphere of protection.

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[18] *Cf. Case of Casa Nina vs. Peru. Preliminary objection, merits, reparations and costs.* Judgment of November 24, 2020. Series C No. 419, para. 80.

[19] *Cf. Case of López Mendoza v. Venezuela. Merits, reparations and costs.* Judgment of September 1, 2011. Series C No. 233, para. 107.

[20] *Cf. Case of Petro Urrego v. Colombia. Preliminary objections, merits, reparations and costs.* Judgment of July 8, 2020. Series C No. 406, para. 96.

[21] Article 23. Political rights.

1. Every citizen shall enjoy the following rights and opportunities: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and (c) to have access, under general conditions of equality, to the public service of his country.

2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

16. The Court asserts that the determination of a specific term or condition in the resolution appointing a provisional prosecutor is sufficient to ensure his job stability, not only as an element necessary to protect the independence of this type of official, but also his right to work.

17. This is a position that lacks certainty. The determination of a specific term in the appointment resolution does not prevent stability in office depending on the discretionality of the appointing authority. The determination of a period of time, in most cases months (three months, six months or even a year), still leaves the renewal or termination of the employment relationship to the discretion of the appointing authority and cannot prevent the official from being exposed to external pressures or having his independence affected due to the lack of security about the renewal of the term.

18. I consider that we can truly speak of stability in office in the case of provisional officials if their permanence is exclusively subject to the holding of a competitive selection procedure or to the commission of a disciplinary or criminal offense. It cannot be argued that, based on precarious short-term contracts, job stability is protected as a component of the right to work, because the determination of a specific term does not ensure the continuity in office or avoid discretionality in the termination decision.

iv) The scope of the concept of control of conventionality in relation to the obligation to amend provisions of domestic law and the concept of an effective judicial remedy

19. In general, it could be said that the control of conventionality, as a mechanism of the inter-American system of human rights, consists in: (i) the obligation not to apply domestic laws that are contrary to the Convention, and (ii) interpreting the Convention and domestic law together to establish which would be the most favorable to the protection of the human rights of those concerned. The elements of this control have been extensively developed in the Court's case law and are consolidated on the basis of its judicial practice and that of the domestic authorities.

20. In the instant case, the Court analyzed the control of conventionality from two angles. On the one hand, it considered that domestic law needed to be amended in relation to the guarantee of irremovability of prosecutors in Peru; on the other hand, it considered that the right to an effective judicial remedy had been violated because the domestic authorities had not applied the inter-American standard.

a. Article 2 of the Convention: obligation to amend provisions of domestic law

21. First, it has to be pointed out that the Court considered that the absence of a term or condition in both the appointment and the removal of Mr. Casa Nina was justified under the provisions of domestic law. Consequently, it criticized not only the authorities' interpretation of domestic law, but also the failure to enact norms leading to the effective observance of such guarantees. Lastly, it ordered the State to make the necessary amendments to its laws to adapt them to the criteria of the Convention. However, it recognized that, before this measure became effective, it corresponded to all the relevant officials to make an interpretation in keeping with the obligations under international law.

22. The formula adopted in the operative paragraphs reveals a possible contradiction because, if it is possible to make an interpretation of the laws that is in keeping with the

Convention, then it is not necessary to make an explicit amendment of them. Decisions that entail State obligations to amend domestic laws should be founded on an evident and irresolvable contradiction with the human rights established in the Convention. In any case, I understand the Court's purpose in simultaneously requiring that domestic law be interpreted in keeping with the Convention and its case law, on the one hand, and the amendment of the law, on the other, is based on consequential logic: If the domestic agents of justice understand that the literal meaning of the domestic laws is contrary to the Convention in the terms indicated in the Court's judgment, it will be necessary to amend the laws.

23. Ultimately, I believe that, in its decisions, the Court should favor the exercise of the control of conventionality by the corresponding interpretation to avoid the delays inherent in amendments to the law, which usually involve lengthy procedures and impede the prompt application of the norms of the Convention and the standards established by the Court.

Humberto Antonio Sierra Porto
Judge

Pablo Saavedra Alessandri
Secretary

CONCURRING OPINION OF
JUDGE RICARDO C. PÉREZ MANRIQUE

CASE OF CASA NINA V. PERU

JUDGMENT OF NOVEMBER 24, 2020
(Preliminary objections, merits, reparations and costs)

I. Introduction

1. The judgment declares the violation of Articles 8(1), 23(1)(c) and 26 of the American Convention on Human Rights (hereinafter "the Convention"), among others, owing to the violation of judicial guarantees, the right to remain in the post under general conditions of equality and the right to work. The case relates to a series of violations that took place in the context of the procedure that culminated with the removal of Julio Casa Nina from the post of Provisional Deputy Prosecutor of the Second Criminal Prosecution Office of the province of Huamanga, Ayacucho, Peru.

2. In its judgment, the Inter-American Court of Human Rights (hereinafter "the IACtHR" or "the Court") rejected the preliminary objections relating to the fourth instance and to the Court's lack of jurisdiction to examine arguments concerning the right to work, and concluded that the Republic of Peru was responsible for the violation of the right to judicial guarantees, the right to remain in the post under general conditions of equality and the right to work, in relation to the obligations to respect and ensure those rights.

3. In this opinion, I concur with the decisions taken in the judgment and submit this opinion in order to: (i) analyze the way in which I consider that the IACtHR should address cases that involve violations of the economic, social, cultural and environmental rights, based on the universality, indivisibility, interdependence and interrelationship of all human rights as grounds for their justiciability, and (ii) examine the protection of participation in public service, its relationship with the human right to work, and the independence of prosecutors under the democratic rule of law.

II. The issue of the justiciability of the economic, social, cultural and environmental rights. Jurisdiction of the IACtHR

a) Objection of lack of jurisdiction *ratione materiae*

4. The State indicated that the IACtHR is unable to assume jurisdiction with regard to the presumed violation of a right or freedom that is not included in the protection system of the Convention and the Protocol of San Salvador. Therefore, it submitted that the Court was not competent to rule on the violation of the right to work under Article 26 of the Convention because the economic, social, cultural and environmental rights cannot be submitted to the system of individual petitions (paragraph 22 of the judgment). For its part, the Inter-American Commission on Human Rights (hereinafter "the Commission") and the representative asked the Court to reject the objection because the rights should be understood integrally and are enforceable in all cases (paragraphs 24 and 25 of the judgment).

5. Ultimately, the Court rejected the preliminary objection and reaffirmed "its competence to examine and decide disputes relating to Article 26 of the American Convention as an integral part of the rights listed in its text, regarding which Article 1(1) establishes obligations of respect and guarantee" (paragraph 26 of the judgment).

6. It was in this sense that I voted to reject the objection raised, considering that the arguments expressed by the IACtHR in the case of *Acevedo Buendía et al. ("("Discharged and Retired Employees of the Comptroller's Office") v. Peru*[1] could be transferred to the position held in this case. In particular, I share the premises set forth in that case as regards: (1) the Court "has the power inherent in its attributes to determine the scope of its own jurisdiction (*compétence de la compétence*)"; (2) when a State accepts the optional clause on the compulsory jurisdiction established in Article 62(1) of the Convention, this results in the State's acceptance of the Court's authority to decide any dispute concerning its jurisdiction; (3) the Court exercises full jurisdiction over all the articles and provisions of the Convention, therefore, this encompasses its Article 26; (4) if a State is a party to the American Convention and has accepted the Court's contentious jurisdiction, the Court is competent to decide whether the said State has incurred in a violation or failed to comply with any of the rights recognized in the Convention, even as regards its Article 26. Therefore, I agree with the decisions made, in the understanding that the analysis of this dispute – that is, the determination of whether the State is responsible for non-compliance with Article 26 of the Convention – corresponded to be addressed in the chapter on merits of this judgment.

b) The justiciability of the economic, social, cultural and environmental rights: history, the debate within the Court, and the different positions. My position.

7. The justiciability of the economic, social, cultural and environmental rights has been a subject of discussion both in legal doctrine and within the IACtHR, and three positions exist in this regard, as I mentioned, *inter alia*, in my concurring opinion to the judgment of November 21, 2019, in the *case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru.*[2] The first position proposes that the analysis of individual violations of the economic, social, cultural and environmental rights must be made exclusively in relation to the rights explicitly recognized by Articles 3 to 25 of the Convention and based on what is expressly permitted by the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (hereinafter "the Protocol of San Salvador") in its Article 19(6).[3] While the second viewpoint asserts that the Court has competence to examine autonomous violations of the economic, social, cultural and environmental rights based on Article 26 of the Convention, understanding that they would be justiciable individually.[4]

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[1] *Cf. Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2009. Series C No. 198, paras. 16 and 17.

[2] *Cf. Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 21, 2019. Series C No. 394.

[3] *Cf. Case of the "Juvenile Re-education Institute" v. Paraguay. Preliminary objections, merits, reparations and costs.* Judgment of September 2, 2004. Series C No. 112, or the *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of June 17, 2005. Series C No. 125, to mention just two examples, as well as the *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2015. Series C No. 298.

[4] *Cf. Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 340, paras. 142 and 154; *Case of the Discharged Employees of PetroPeru et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2017. Series C No. 344, para. 192; *Case of San Miguel Sosa et al. v. Venezuela. Merits, reparations and costs.* Judgment of February 8, 2018. Series C No. 348, para. 220; *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349, para. 100; *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, paras. 75 to 97; *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375, paras. 34 to 37; *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 21, 2019. Series C No. 394, paras. 33 and 34; *Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2019. Series C No. 395, para. 62, and *Case of the Indigenous Communities of the*

8. As I have mentioned in previous concurring opinions and reiterating the arguments presented in them,[5] I adhere to a different position, which I have called "the thesis of indivisibility-simultaneity" which is based on the universality, indivisibility, interdependence and interrelationship of the human rights, to maintain that the Court has competence to examine violations of the economic, social, cultural and environmental rights. And this is due to the conviction that human rights are interdependent and indivisible so that the civil and political rights are interwoven with the economic, social, cultural and environmental rights. This interdependence and indivisibility allow the individual to be observed integrally as the titleholder of all rights. If he/she is not seen in this way, the rights and human dignity would be artificially fragmented.

9. A similar perspective is asserted in the Preamble to the Protocol of San Salvador: "Considering the close relationship that exists between economic, social and cultural rights, and civil and political rights, in that the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human person, for which reason both require permanent protection and promotion if they are to be fully realized, and the violation of some rights in favor of the realization of others can never be justified."

10. In this perspective, Article 26 of the Convention functions as a framework article, in the understanding that it makes a general reference to the economic, social, cultural and environmental rights, and refers us to the OAS Charter for their description and determination. The Protocol of San Salvador individualizes and provides content to the economic, social, cultural and environmental rights, explaining that cases related to trade union rights and education are justiciable before the Court by means of individual petitions (Art. 19(6)). The Protocol mentions that it is essential that those rights be reaffirmed, developed, perfected and protected (see Preamble). Finally, a series of instruments of the inter-American *corpus juris* also refer to the ESCER.

11. I have already underlined the importance of Article 4 of the Protocol of San Salvador insofar as it does not admit restrictions of the ESCER. Article 4 of the Protocol of San Salvador indicates that: "[a] right which is recognized or in effect in a State by virtue of its internal legislation or international conventions may not be restricted or curtailed on the pretext that this Protocol does not recognize the right or recognizes it to a lesser degree." In application of this provision, the Monitoring Mechanism of the Working Group on the Protocol of San Salvador has been established responsible for defining the indicators that should be included in the reports of the States Parties and for monitoring compliance with the obligations under the Protocol.

12. In my opinion, based on the foregoing and its precedents, it is necessary to conclude that it is not possible to restrict access to inter-American justice in the case of alleged violations of economic, social, cultural and environmental rights. That position would even be contrary to the principle of the *pro persona* interpretation of human rights established in Article 29 of the Convention understanding this as a hermeneutic tool from the systemic perspective of the inter-American system for the protection of human rights.

13. I have also noted that the Protocol of San Salvador, while developing the content of

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Lhaka Honhat (Our Land) Association v. Argentina. Merits, reparations and costs. Judgment of February 6, 2020. Series C No. 400, para. 195.

[5] *Cf.* Concurring opinion to the judgment of November 21, 2019, in the *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru.* and to the judgment of November 22, 2019, in the *Case of Hernández v. Argentina; Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina,* and *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil.*

the economic, social and cultural rights, expressly prescribes the use of the system of individual petition in Article 19(6) for the rights to work and education. Consequently, in those cases, it is not necessary to make any effort to argue this, because the Court's competence results from the text of the treaty.

14. In addition, it should be borne in mind that Part II of the Convention indicates in its Article 44 that: "Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party." Meanwhile, Article 48 indicates that: "[w]hen the Commission receives a petition or communication alleging violation of any of the rights protected by this Convention, it shall proceed as follows … ." Similarly, Article 62(3) of the Convention indicates that: "[t]he jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it …" (underlining added).

15. The analysis of the preceding articles reveals that: (1) the civil, political, economic, social, cultural and environmental rights may be submitted to the consideration of both organs of protection; (2) the Commission and the IACtHR can have competence over the cases lodged in this regard; (3) no distinction is made between civil, political, economic, social, cultural and environmental rights as regards their protection, and (4) to claim that the inter-American organs of protection can only examine the civil and political rights would be contrary to the notions of universality, indivisibility, interdependence and interrelationship of the human rights, and entail a fragmentation of the international protection of the individual that would be directly detrimental to human dignity, which is the basis and purpose of human rights

16. In the case of the removal of Sr. Casa Nina, it is argued that there was a failure to provide an objective resolutive condition prior to his appointment to office establishing the termination of his appointment as a provisional prosecutor. Thus, the Court understood " that Mr. Casa Nina occupied the post without the security of tenure,[6] that is without an essential safeguard to ensure his independence" (paragraph 86). It should be indicated that over and above the provisional nature of the post, the State had the duty to ensure objective criteria for the termination of the provisional appointment in order to guarantee independence in the exercise of the adversarial function.

17. Thus, by a harmonious interpretation of the inter-American instruments considering the interdependence and indivisibility of the civil and political rights on the one hand, and the economic, social, cultural and environmental rights on the other, the Court is able to rule on the violations of one or the other. Therefore, the same fact based on act or omission may simultaneously signify the violation of a civil and political right and of an economic, social, cultural or environmental right.

18. As can be seen from the third operative paragraph the judgment: "The State is responsible for the violation of judicial guarantees, the right to remain in the post under general conditions of equality and the right to work recognized in Articles 8(1), 23(1)(c) and 26 of the American Convention on Human Rights, in relation to Articles 1(1) and 2 of this instrument."

19. I agree with this paragraph inasmuch as it reveals that there was a joint and

[6] The witness Rita Arleny Figueroa Vásquez stated that "one of the rights of prosecutors is permanence in the service until they are seventy (70) years of age, pursuant to the Peruvian Constitution; however, in the case of the non-career provisional prosecutor this benefit cannot be required, because their permanence depends on the decision of the service, that is, the Prosecutor General, because due to 'needs for the service' he/she may terminate his 'designation.'" *Cf.* Statement made by Rita Arleny Figueroa Vásquez (evidence file, volume VI, affidavits, folio 1243).

simultaneous violation of the rights: to special protection for access to and permanence in public office and independence of the prosecutor established in Article 23(1) of the Convention, and the right to work, because the independence guaranteed by job stability, pursuant to Article 26 of the Convention, was not respected or ensured. Moreover, this right is also recognized by Article XIV of the American Declaration which establishes that: "Every person who works has the right to receive such remuneration as will, in proportion to his capacity and skill, assure him a standard of living suitable for himself and for his family." In my opinion, in the instant case, this joint and indivisible violation of rights provides the grounds for the competence of the Inter-American Court of Human Rights.

20. This is so because I consider that the violated civil and political rights are indivisible from the right to work, because the violations of the right recognized in Article 23(1) of the American Convention are directly related and constitute facts that are inseparable from the violation of the right to work. On this basis, I will now examine the importance of the protection of participation in public service, its relationship to the human right to work and the independence of prosecutors under the democratic rule of law.

III. Protection of participation in public service, its relationship to the human right to work and the independence of prosecutors under the democratic rule of law

21. As the judgment indicates, the protection of participation in public service in relation to the human right to work and the protection of the independence of prosecutors is essential under the democratic rule of law. Consequently, in order to examine the arguments of the Court, I will present my thoughts on some concepts related to this issue linking the protection of the universal system of human rights to the regional system.

22. When addressing this matter, the Court started by clarifying the issue of recognition of the specific guarantees for judges and prosecutors. To this end, it based itself on three premises: (i) the State's duty to ensure the provision of judicial services; (ii) the fundamental need that those who intervene in the provision of such services are tenured officials, with pre-established causes for removal or dismissal, and (iii) in exceptional cases in which the designation of provisional officials is required, the appointment, permanence and termination of the exercise of the function is subject to predetermined conditions" (paragraph 69).

23. Therefore, in this opinion, I underscore that the Court has indicated the need that, with regard to violations of human rights and, in general, in criminal cases, "States must ensure an independent and objective investigation,"[7] and "has emphasized that the authorities responsible for the investigation must enjoy *de jure* and *de facto* independence*,* which requires not only hierarchical or institutional independence, but also real independence*'"* (paragraph 69).[8] Added to which, "in order to safeguard the independence and objectivity of prosecutors

[7] *Cf. inter alia, Case of Bueno Alves v. Argentina. Merits, reparations and costs.* Judgment of May 11, 2007. Series C No. 164, para. 108, and *Case of Isaza Uribe et al. v. Colombia. Merits, reparations and costs.* Judgment of November 20, 2018. Series C No. 363, para. 150.These requirements, among others, are referred to in the following instruments: the Convention against Torture and Other Cruel, inhuman or Degrading Treatment or Punishment, 1984, Article 12; Inter-American Convention to Prevent and Punish Torture, 1985, Article 8; United Nations Convention against Corruption, 2003, Article 11(2), and International Convention for the Protection of All Persons from Enforced Disappearance, 2006, Article 12. See also: Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary or Summary Executions, Recommended by the United Nations Economic and Social Council in its Resolution 1989/65, of May 24, 1989, Principle 9; Principles on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted by the United Nations General Assembly in the annex to its Resolution 55/89 of December 4, 2000, Principle 2, and Committee against Torture, General Comment No. 2, *Application of Article 2 by the States Parties*, CAT/C/GC/2, January 24, 2008, para. 26.

[8] *Cf. Case of Baldeón García v. Peru. Merits, reparations and costs.* Judgment of April 6, 2006. Series C No. 147, para. 95; *Case of Montero Aranguren et al. (Retén de Catia) v. Venezuela. Preliminary objection, merits, reparations*

in the exercise of their functions, they are also protected by the following guarantees: (i) guarantees of appropriate appointment; (ii) to irremovability from office, and (iii) to be protected against external pressures" (paragraph 79).

24. It is bearing this in mind that I stress the special importance of safeguarding the independence of prosecutors in order to preserve the rule of law. This has already been developed by the Court in the case of *Martínez Esquivia v. Colombia*, in which it concluded that the guarantee of stability and irremovability of judges, addressed at safeguarding their independence was applicable to prosecutors owing to the nature of their functions. This assertion is especially significant in the inter-American environment where, in recent decades, almost all the countries have put in practice adversarial systems of criminal investigation. The impartiality of the Public Prosecution Service is essential to avoid arbitrariness and to ensure fairness in the exercise of criminal investigations.

25. Those who work in public service are also encompassed by the right to work. I emphasize the provisions of the International Labour Organization's Convention 151 on Labour Relations (Public Service), 1978.[9] Article 9 of the Convention recognizes the civil and political rights of public employees and indicates that: "Public employees shall have, as other workers, the civil and political rights which are essential for the normal exercise of freedom of association, subject only to the obligations arising from their status and the nature of their functions." Also, Article 8 of this Convention establishes that the settlement of disputes, "shall be sought, as may be appropriate to national conditions, through negotiation between the parties or through independent and impartial machinery, such as mediation, conciliation and arbitration, established in such a manner as to ensure the confidence of the parties involved."

26. With regard to the instant case, Mr. Casa Nina, as a prosecutor which is a public official, also receives a protection of labor law in the exercise of his functions, and the analysis made in the judgment is appropriate. Taking into account the provisions of Convention No. 151, it is important to emphasize the protection of the civil and political rights of public officials and the recommendation as regards the settlement of disputes concerning working conditions or the permanence in office using systems of collective bargaining or others such as mediation. Owing to his dual condition as a public official and a prosecutor, the victim enjoyed the essential legal protection to be able to exercise his functions with independence, a guarantee that is intrinsically related to the democratic rule of law.

27. The foregoing is complemented by the United Nations "Guidelines on the Role of Prosecutors" mentioned in the judgment, which establish the status and conditions of services of those who are appointed as prosecutors, establishing that "States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability."[10] The principle of independence of the public functions of the prosecutor may also be interpreted based on the "Basic Principles on the Independence of the Judiciary" adopted by the Seventh United Nations Congress held in Milan from August 26 to September 6, 1985.[11]

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and costs. Judgment of July 5, 2006. Series C No. 150, para. 81, and *Case of Zambrano Vélez et al. v. Ecuador. Merits, reparations and costs.* Judgment of July 4, 2007. Series C No. 166, para. 122.

[9] International Labour Organization. Convention 151 on Labour Relations (Public Service), 1978. Available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C151.

[10] Guidelines on the Role of Prosecutors. Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27 to September 7, 1990. UN Doc. A/CONF.144/28/Rev.1, para. 4. https://www.ohchr.org/en/professionalinterest/pages/roleofprosecutors.aspx.

[11] "Basic Principles on the Independence of the Judiciary," available at: https://www.ohchr.org/en/professionalinterest/pages/independencejudiciary.aspx.

IV. Conclusion

28. The Court should not lose sight of the fact that its primary function is to hear cases that require the interpretation and application of the provisions of the Convention when these are submitted to it in order to decide whether there has been a violation of a protected right or freedom, and to rule that the injured party should be ensured the enjoyment of his violated right or freedom. In this regard, the Court has a vocation to do justice in concrete cases within the limits established by the law of treaties. But it also has a function of contributing to achieve the purposes of the Convention and that entails responding to the problems from which our societies suffer. It is important to consider that the Court's legitimacy is founded on the solidity of its reasoning, on its compliance with the law and on the prudence of its rulings.

29. In the instant case, Mr. Casa Nina had to exercise the function of prosecutor without the security of permanence in office owing to the provisional nature of his appointment, which signified the lack of a safeguard to ensure his independence. It is in this regard that this opinion concurs with the judgment and stresses the importance of protecting the performance of public service also as an integral part of labor law, especially taking into account in this case the importance of the independence of prosecutors under the democratic rule of law.

Ricardo C. Pérez Manrique
Judge

Pablo Saavedra Alessandri
Secretary